

TRAFFIC MITIGATION *g u i d e l i n e s*

GUIDELINES (INCLUDING FORM AGREEMENT) OF THE MONTGOMERY COUNTY PLANNING BOARD FOR THE ADMINISTRATION OF
TRAFFIC MITIGATION PROGRAMS FOR PRELIMINARY PLANS OF SUBDIVISION UNDER THE ADEQUATE PUBLIC FACILITIES ORDINANCE

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Approved by:
THE MONTGOMERY COUNTY PLANNING BOARD

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Approved Form Agreement

**PLANNING BOARD ADMINISTRATIVE GUIDELINES
FOR TRAFFIC MITIGATION AGREEMENTS
IN CONJUNCTION WITH SUBDIVISION APPLICATIONS**

I. Introduction

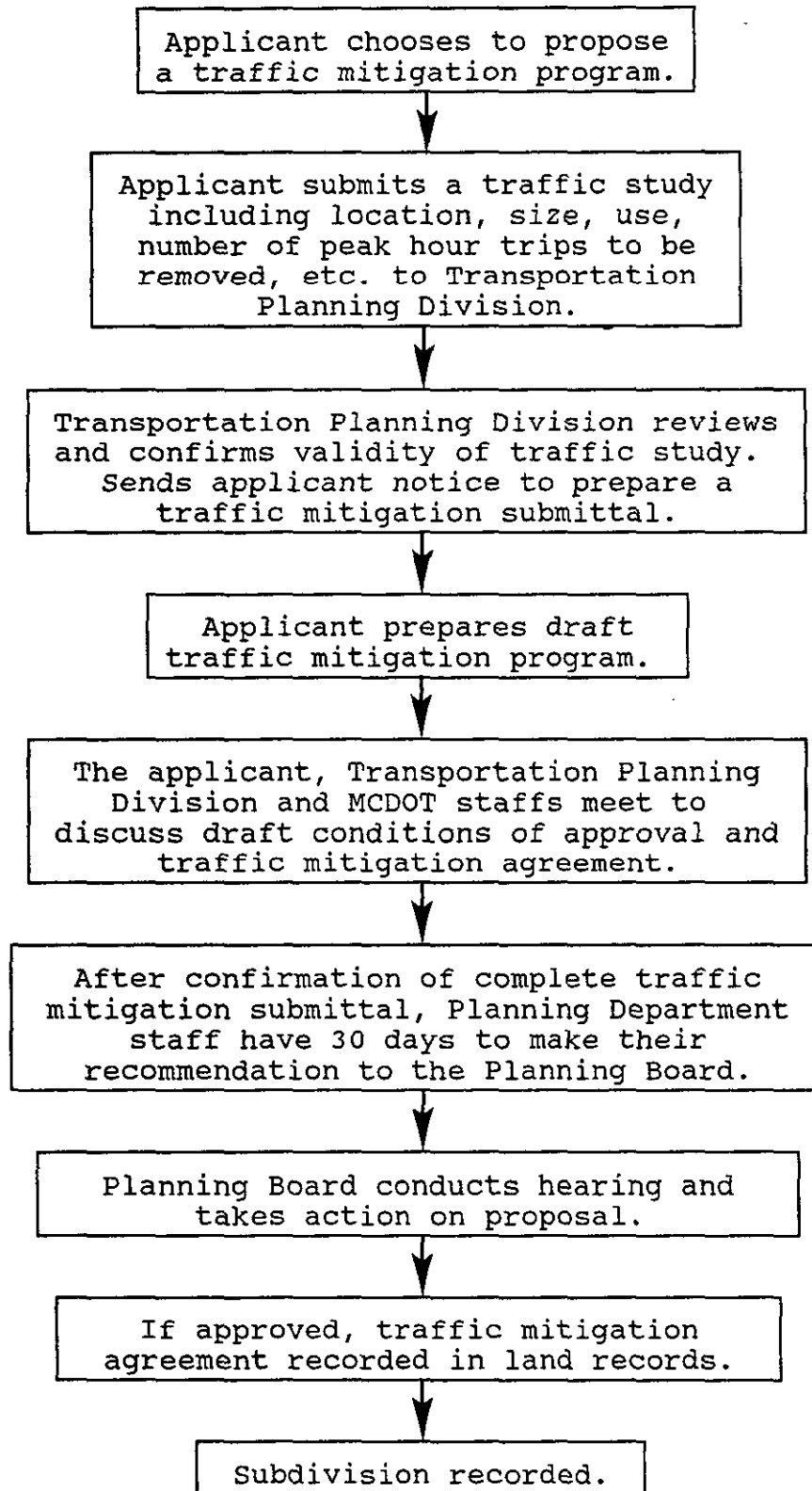
The Planning Board, in the course of its various regulatory reviews, may be required by operation of law to make a determination that a certain traffic mitigation program proposed by an applicant will be an acceptable means to offset trips above acceptable levels which would be generated by a proposed development. Under some circumstances, an applicant may prefer to operate a mitigation program in lieu of constructing a capital road improvement project to offset the traffic impact created by the proposed development. Such an election by an applicant is voluntary, which election once made and implemented allows development to occur when and where it is otherwise constrained by traffic congestion. The mitigation program, including specific trip mitigation components and measures, is evidenced by an enforceable agreement intended to ensure that traffic mitigation will offset the impact of the development.

Typically, the Planning Board will be expected to review a proposed traffic mitigation program in the context of its review of a preliminary plan of subdivision for a proposed development. By law, the Planning Board must complete these reviews within time constraints established in applicable sections of the subdivision regulations. An application will not be considered complete, and statutory time constraints for Planning Board action will not begin to run, until the applicant has submitted all materials called for by these guidelines and applicable law.

II. Applicability

These guidelines are intended to be applicable to all traffic mitigation programs which are reviewed by the Planning Board in the course of the Board's consideration of preliminary plans of subdivision pursuant to the Adequate Public Facilities Ordinance (Section 50-35, Montgomery County Code). Traffic mitigation proposals will be considered for meeting both Local Area Transportation Review and Policy Area Transportation Review requirements established in the Annual Growth Policy.

PROCESSING A TRAFFIC MITIGATION PROPOSAL



III. Processing of a Traffic Mitigation Proposal

- A. An applicant who wishes to propose a traffic mitigation program shall first present to the Transportation Planning Division staff a complete traffic study or traffic statement, as required by the Local Area Transportation Review Guidelines. The study/statement shall identify the location of the proposed development, its proposed usage and size, any existing development on the property, and other pertinent background information related to the development. The study/statement shall also specify the number of peak-hour trips that must be removed to satisfy both the Policy Area Transportation Review and Local Area Transportation Review.

Transportation Planning Division staff shall review the study/statement and confirm the number of trips to be removed. Staff will then send the applicant notice of such confirmation and will ask the applicant to prepare and deliver to Transportation Planning Division staff and MCDOT staff a complete traffic mitigation submittal, which must include:

1. "Draft Traffic Mitigation Agreement" (form) ¹
2. "Program Attachment" setting forth particular aspects/features of the traffic mitigation program to be incorporated in the Agreement, including the following items, as applicable:
 - a. Description/nature of project
 - b. Trip reduction goal
 - c. Traffic mitigation components/measures
 - d. Role of transportation coordinator
 - e. Schedule for goal attainment related to approval of the release of permits for development, including any phasing of goal and construction
 - f. Market area to be served by program
 - g. Duration/term of program

¹ A draft form Traffic Mitigation Agreement, reviewed and approved by the Planning Board simultaneously with its consideration and adoption of these guidelines, is part of and supplements these guidelines. The Planning Board expects each applicant to follow this form unless unique facts and circumstances warrant modification.

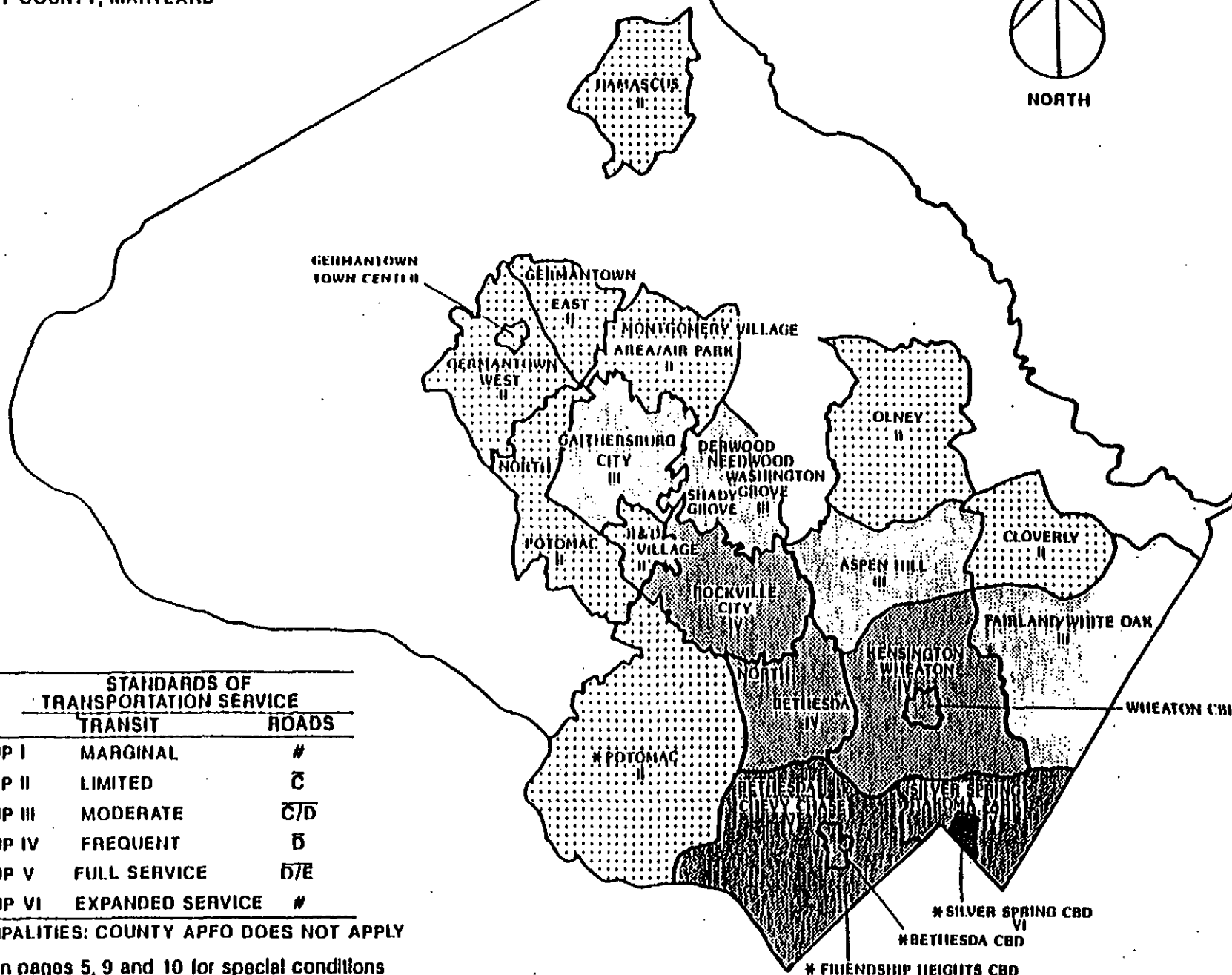
- h. Type and amount of financial security instrument, including calculation for posting portions of security when phasing is proposed
 - i. Frequency of performance tallies and annual evaluations
 - j. Schedule and amount of payments for Planning Department audits
- B. Upon receipt of the submittal, the Transportation Planning Division and MCDOT staffs shall coordinate meetings with the applicant to review the submittal and discuss recommended conditions of preliminary plan approval and the draft traffic mitigation agreement.
- C. The Planning Department staff shall make a recommendation regarding the submittal within 30 days after staff confirmation of a complete traffic mitigation submittal. The staff recommendation will be made available in advance of a Planning Board public hearing on the preliminary plan.
- D. It is the obligation of the applicant to design the operational components of the traffic mitigation program such that they have a reasonable chance of meeting and maintaining the trip reduction goal.
- E. To the extent possible, the applicant shall "piggy-back", as further described in Section V, C-1, onto existing privately-sponsored programs that have a proven record of success and to coordinate with MCDOT when the term of the program is expiring to facilitate an election by MCDOT to operate some or all of the program upon its expiration.
- F. In areas where public transit facilities are available at the AGP Group IV (frequent) level and above, the applicant should emphasize traffic mitigation strategies that rely upon public transit as the primary alternative to the single-occupant automobile, unless such reliance is not practical or feasible.
- G. The applicant is required to initiate and commence operation of the approved traffic mitigation program prior to the receipt of building permits for construction of the project. The applicant will also be required to achieve some or all of the assigned trip reduction goal at predetermined time periods, e.g. prior to building permit, use/occupancy permit, or a fixed time following occupancy. This will require the applicant to initially focus upon utilizing the off-site components of its program to achieve the

STANDARDS OF TRANSPORTATION SERVICE

MONTGOMERY COUNTY, MARYLAND



NORTH



KEY	STANDARDS OF TRANSPORTATION SERVICE	
	TRANSIT	ROADS
GROUP I	MARGINAL	#
GROUP II	LIMITED	C
GROUP III	MODERATE	C/D
GROUP IV	FREQUENT	D
GROUP V	FULL SERVICE	D/E
GROUP VI	EXPANDED SERVICE	#

Note: MUNICIPALITIES: COUNTY APFO DOES NOT APPLY

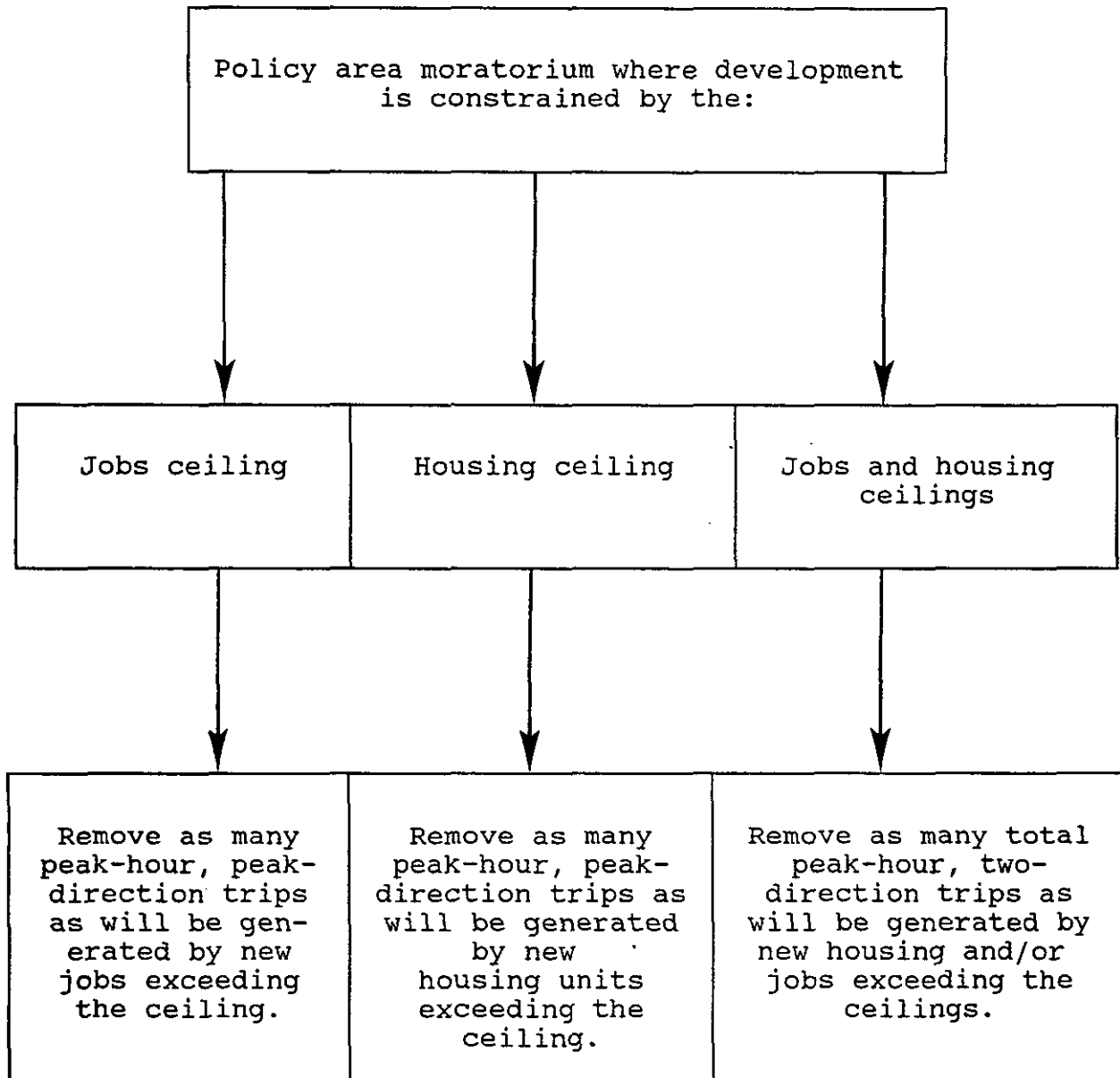
See text on pages 5, 9 and 10 for special conditions

* See page 5 for a discussion of different master plan guidelines

trip reduction goal, since potential users of the on-site component are not yet occupying the project. However, as the project is occupied, the applicant is encouraged to promote greater utilization of the on-site program by shifting resources away from the off-site program and to operation of the on-site program since the purpose of the program is to mitigate site-generated trips. Such shifting of resources should occur in a manner that does not impose significant expenses upon the applicant and allows the trip reduction goal to be maintained.

- H. The applicant may utilize off-site traffic mitigation measures in combination with on-site measures, as approved by the Board, to achieve the trip reduction goal. Initially, the applicant shall rely primarily on proposed off-site traffic mitigation measures to achieve the trip reduction goal. On-site measures, if any, may be proposed to achieve initially up to 25% of the goal. Once the goal is achieved, on-site measures may be utilized to maintain greater than 25 % of the goal after it is met. To the degree that the applicant utilizes on-site measures, on-site parking supply should be balanced with the mitigated parking demand to the extent allowed by code. Timing for goal achievement is discussed in Section VI.
- I. The Planning Board will endeavor to refrain from sanctioning other privately-operated programs that undermine the ability of the applicant to operate the approved traffic mitigation program and meet the goal in the market area to be served.

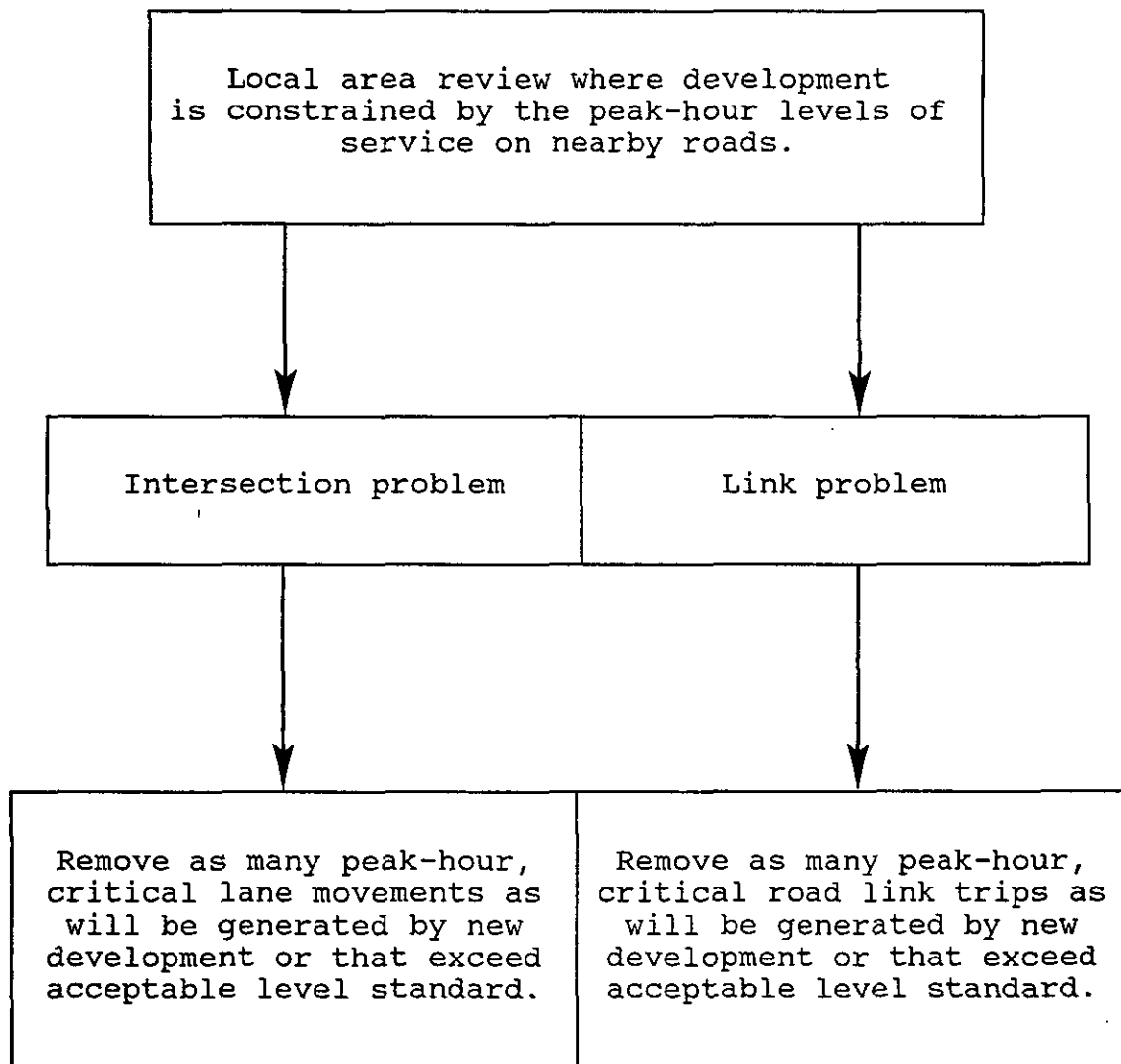
CALCULATING THE TRAFFIC MITIGATION GOAL (PAR)



IV. Calculating the Traffic Mitigation Goal

- A. From the standpoint of Policy Area Transportation Review pursuant to the AGP, the Planning Board may approve a preliminary plan application that would otherwise cause the housing and/or jobs staging ceilings to be exceeded if the applicant also proposes to implement a traffic mitigation program that will remove vehicle trips from within the policy area during the generalized peak hour as follows:
1. For a policy area which has insufficient jobs ceiling, the program will remove at least as many peak direction trips as are generated by the development's increment of new jobs which exceeds the ceiling. (Trips into the development in the AM, out of it in the PM.)
 2. For a policy area which has insufficient housing ceiling, the program will remove at least as many peak direction trips as are generated by the development's increment of new housing units which exceeds the ceiling. (Trips out of the development in the AM, into it in the PM.)
 3. For a policy area which has insufficient jobs and housing ceiling, the program will remove at least as many peak direction trips as are anticipated to be generated by the development's increment of new jobs and housing units which exceed the ceilings. (Trips into and out of the development.)
- B. From the standpoint of local area transportation review, the Planning Board may approve a preliminary plan application that would otherwise cause unacceptable peak-hour levels of service on nearby affected roads if the applicant proposes to implement a traffic mitigation program that:
1. eliminates existing and future peak-hour critical lane movements in an amount at least equal to the critical lane movements that are anticipated to be generated beyond acceptable limits during the generalized peak hour by the proposed development at the identified intersections (as specified in the Planning Board's adopted Local Area Transportation Review Guidelines), and/or
 2. removes existing and future peak-hour vehicle trips from a critical road link in an amount at least equal to the peak-hour vehicle trips that are anticipated to be generated by the proposed development beyond acceptable limits.

CALCULATING THE TRAFFIC MITIGATION GOAL (LATR)



V. Duration and Extension of the Program

- A. The applicant shall achieve and maintain a fixed trip reduction goal in accordance with a schedule, including any phasing, as approved by the Planning Board. Except in the case of "piggybacking", once a traffic mitigation program or any phase of a program achieves its trip reduction goal, it must continue operating for a twelve-year period, unless the term is modified or terminated by the Planning Board.
- B. Any failure to maintain the goal over a period of three consecutive months and/or to comply with other aspects of the traffic mitigation agreement, based upon tallies, reports, audits, and other information, shall cause the applicant to be subject to a finding of non-compliance by the Planning Department and MCDOT staffs. In such an event, the applicant must take immediate steps to reach the goal.

If the applicant is unable or unwilling to revise the program as requested by staff and MCDOT and is unable to reach the goal in accordance with provisions of the agreement, then other mandatory revisions may be required by the Planning Board to be implemented by the applicant after a public hearing with the Board.

In conducting a public hearing, the Board will seek testimony on recommended improvements or changes to the program. Simultaneous with the scheduling of a public hearing, the applicant will be required to notify, to the extent possible, the users of the program of impending changes. Following the public hearing and the Board's review of staff recommendations, the Planning Board may require the applicant to revise the program.

If, following the public hearing, the Board determines that the components of the program and/or TMA must be amended to achieve the goal, then the term of the program may be lengthened to reflect the period of non-compliance, and the value of the required security instrument may be changed to reflect the revised program.

- C. In order to assure the continuation of a successful traffic mitigation program by another applicant beyond the original term, the Planning Board shall:
 - 1. consider "piggybacking" of the program, whereby a new applicant seeking preliminary plan approval agrees to increase the number of trips removed by an existing privately-sponsored program and to extend the life of that program beyond the

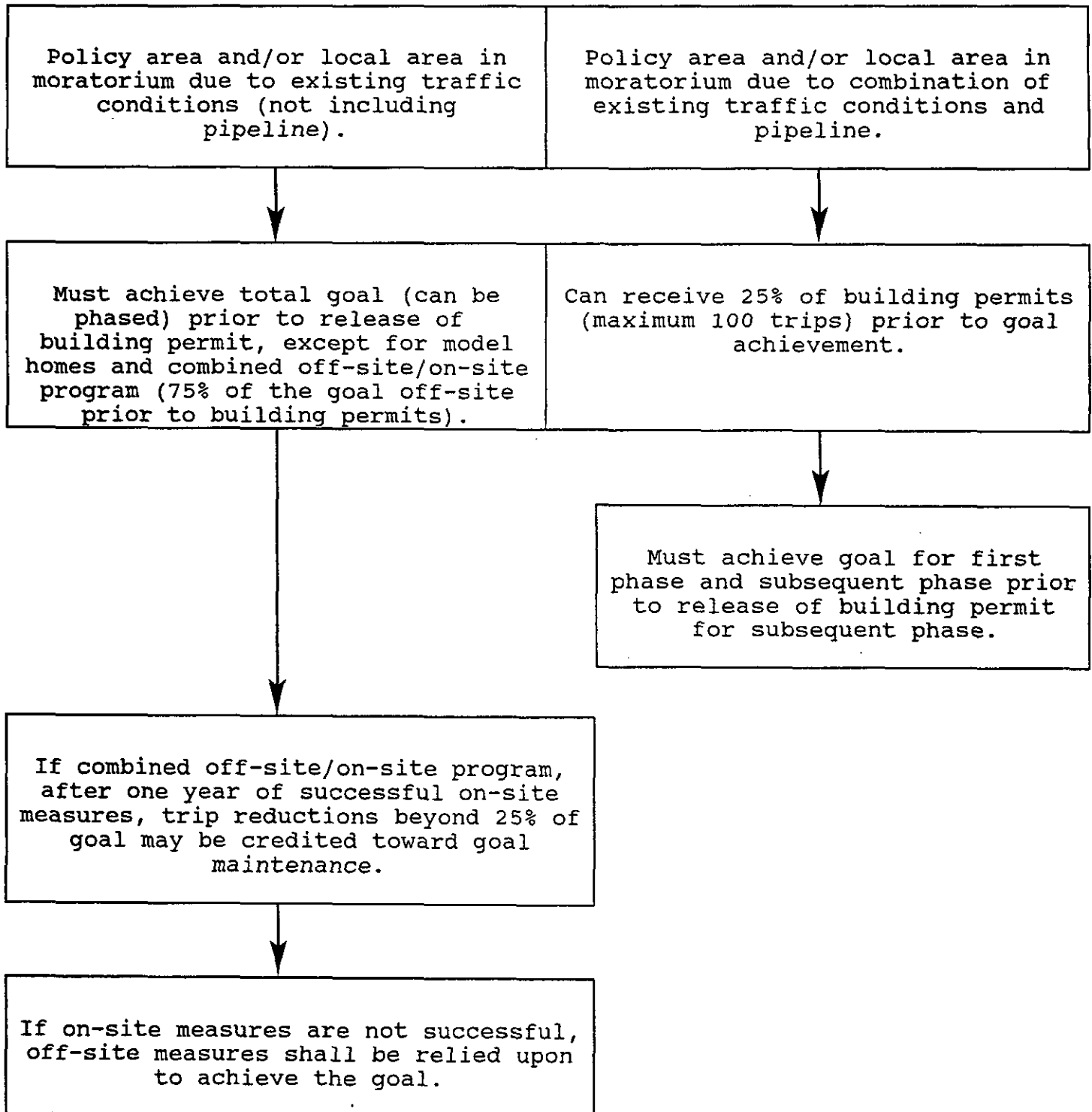
original term. During a period of overlapping responsibilities, the new applicant would ordinarily compensate the existing sponsor of the program for strengthening the existing program and would be responsible for achieving and maintaining its own share of the program's combined trip reduction goal. When the term of the existing sponsor expires, the new applicant would have sole responsibility for continuing the program and maintaining the entire combined goal. In exchange for maintaining a higher goal than would otherwise be required, the term of the new applicant's program would be less than ordinarily required, as recommended by Planning Department staff and approved by the Planning Board. Under piggybacking, the duration of the program shall be extended by a minimum of three years beyond the previous applicant's term. Wherever possible, applicants are encouraged to utilize piggybacking of existing, successful privately-sponsored programs rather than starting entirely new and untried programs.

2. advise MCDOT that the term of the program is about to expire. Three years before the applicant's obligations terminate, if "piggybacking" of a program is not expected to occur, the Planning Board shall advise MCDOT of such termination and MCDOT shall consider extending the program with public funds, if funds are available and extension is practical.

VI. Timing for Achievement of the Goal

- A. The timing for goal achievement is dependent on whether the problem being mitigated results from existing traffic conditions only or a combination of existing and future traffic. When a policy area review (staging ceiling) or local area review constraint is entirely due to existing traffic conditions only (not including the pipeline of approved development), a traffic mitigation program must achieve the applicant's total trip reduction goal before the Development Review staff approves release of the initial building permit for the proposed development, except in the following instances:
 1. Staff may approve the release of a percentage of building permits when a similar percentage of peak-hour trips is reduced, in 25% increments or in percentage increments translating to 25 peak-hour trips reduced, whichever is less.

TIMING FOR ACHIEVEMENT OF TRIP REDUCTION GOAL



2. For a proposed residential development, staff may approve the release of one model home building permit for each housing type to be built, not to exceed a total of six building permits. The model homes may be built prior to goal achievement, but must not be sold and occupied until achievement of the total trip reduction goal or phased portion of goal as appropriate.
3. When the applicant intends to implement both off-site and on-site measures:

(i) initially at least 75% of the total trip reduction goal must be achieved by the off-site measures prior to the release of any of the proposed development's building permits. The remainder of the goal, of up to 25%, must be removed by operation of the on-site measures within a time frame established by the Board, usually being one year after the applicant's acceptance of the development's initial use and occupancy permit. Subsequently, increased utilization of on-site measures to achieve required peak-hour trip reductions is encouraged and, when implemented, may reduce or modify the applicant's off-site measures.

(ii) The off-site measures may only be revised upon a showing that the revised program will continue to achieve the goal and directly cause fewer peak-hour auto-drivers than would otherwise have been anticipated at such a development.

(iii) Applicant shall be credited for goal compliance by operation of the on-site measures once staff determines that the on-site goal has been achieved. If the on-site measures do not achieve or maintain the on-site goal as the applicant anticipates, the applicant shall revise its on-site measures and/or continue to implement or further implement the off-site measures to achieve the total trip reduction goal. The need to continue the off-site program for the entire term must be accounted for in the value of the applicant's security instrument.

- B. When a policy area review or local area review constraint is due to a combination of both existing traffic conditions and trips associated with the pipeline of approved development, implementation of the program and achievement of any trip reduction goal may be deferred, and staff may approve the release of building

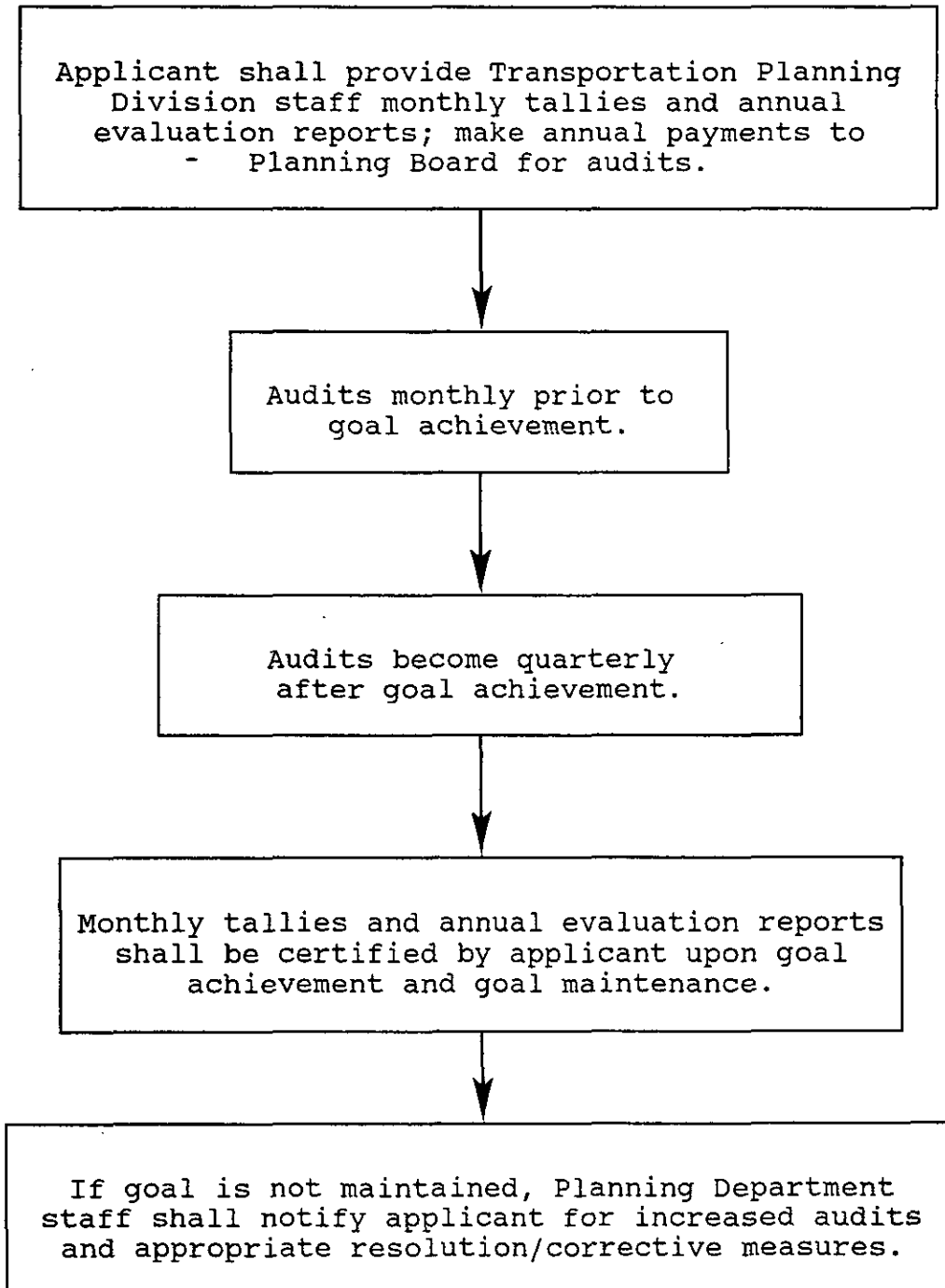
permits representing up to 25% of the total number of trips (not to exceed 100 trips and in any event not to exceed the number of housing units or jobs in the net staging ceilings) until the earlier of (1) the passage of five years from the date the first building permit for such phase is released or (2) the date the applicant seeks the release of the first building permit in the next phase. Prior to releasing any building permit, the applicant shall enter into a standard traffic mitigation agreement that provides for this contingency and post a security instrument in an acceptable amount that covers operations of the program for the initial phase. Prior to the release of any additional building permits for a subsequent phase, the trip reduction goal for the initial increment and that increment associated with the subsequent phase must be achieved.

VII. Evaluating/Monitoring Compliance with the Goal

- A. The applicant shall provide the Transportation Planning Division staff monthly tallies and annual evaluation reports on the effectiveness of the program, using a format determined in the agreement. Each compilation of monthly tallies and reports submitted to the Commission must be certified as to their accuracy and completeness by applicant and any person applicant retains to compile or prepare such materials upon goal achievement and for goal maintenance. Staff shall provide MCDOT copies of all tallies and reports.
- B. The Planning Board staff shall conduct audits of applicant's tallies for the purpose of assisting staff to measure the accuracy of the applicant's tallies. The applicant shall make an annual payment to the Planning Board to defray the cost of administering and conducting audits of the tallies provided by the applicant. The amount of the payment shall cover the cost of at least twelve audits, which covers a worst case scenario where the Board requires monthly audits. Ordinarily, the Board will anticipate less frequent audits as provided below. Any monies not used shall roll over to the next year. Applicant shall supplement the balance held by the Commission by any amount expended during the prior year. The payments shall be due on January 2 of each year of the program's term.

As a rule, audits shall be performed on a schedule of once per month prior to goal achievement, and once every three months for goal maintenance. Transportation Planning Division staff may make exceptions to that schedule if the program is not maintaining its

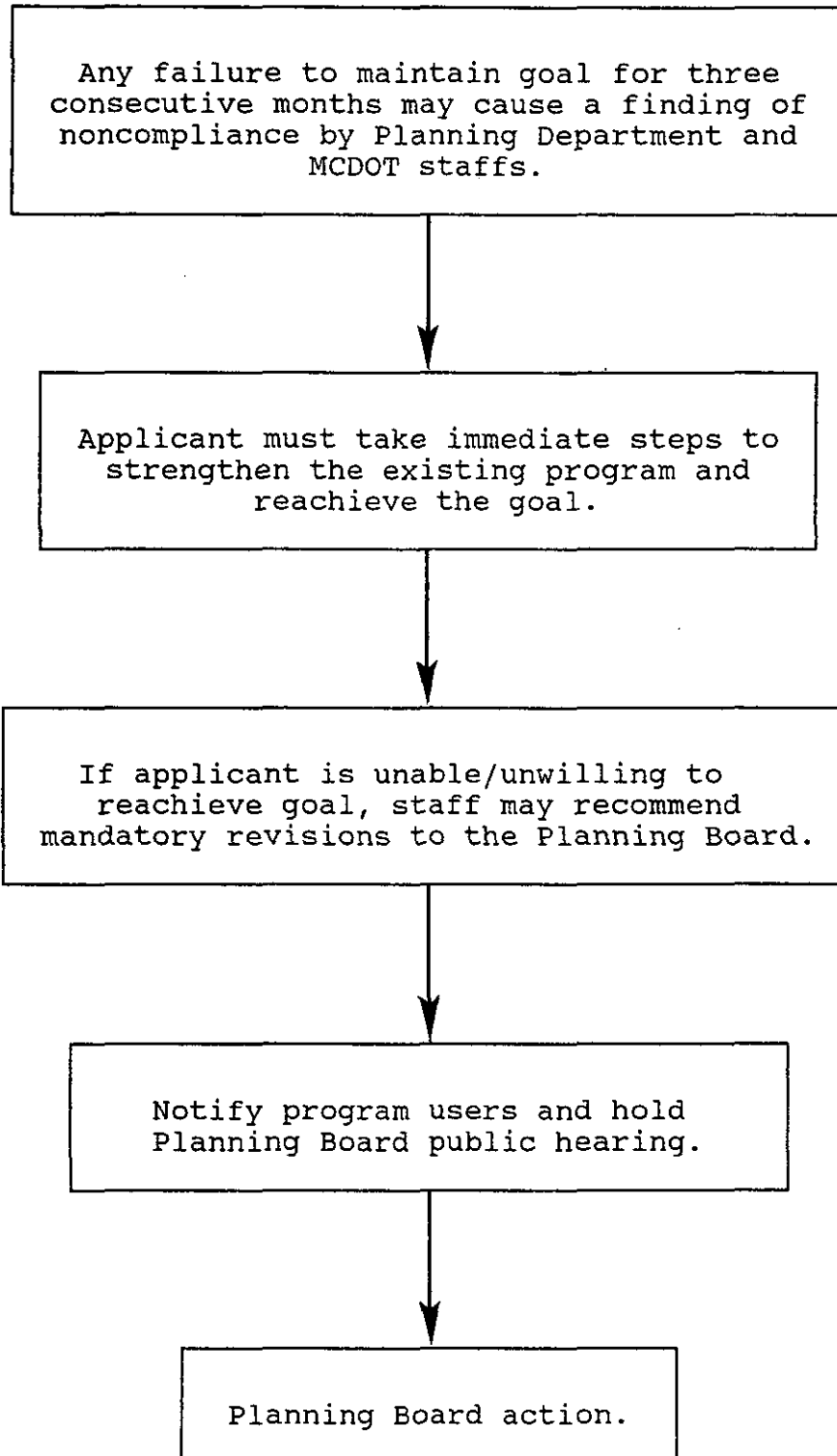
EVALUATING/MONITORING GOAL COMPLIANCE



goal, but in no event shall audits be made on a schedule of more than four times per month or less than once every three months. If the results of the applicant's monthly tallies are inconsistent with the results of the periodic audits, the Planning Department staff shall make this information available to the applicant. Inconsistencies shall be resolved and, if necessary, corrective measures to avoid further inconsistencies shall be taken, as appropriate.

- C. Achievement and maintenance of the goal shall be determined by calculating peak-hour trips removed, averaged over two-month and three-month periods, respectively. The calculation shall be based on the applicant's tallies, as confirmed or adjusted as a result of the audits.
- D. The TMA may provide for and authorize staff to modify various terms and conditions of the program and agreement, provided that only the Planning Board may modify the term/duration of the program and the trip reduction goal. Verifiable, abnormally high vacancy rates will be considered by staff when determining goal maintenance. Staff may agree to a temporary adjustment of the goal upon such a showing, provided the adjustment does not exceed 12 months.

FAILURE TO MAINTAIN GOAL



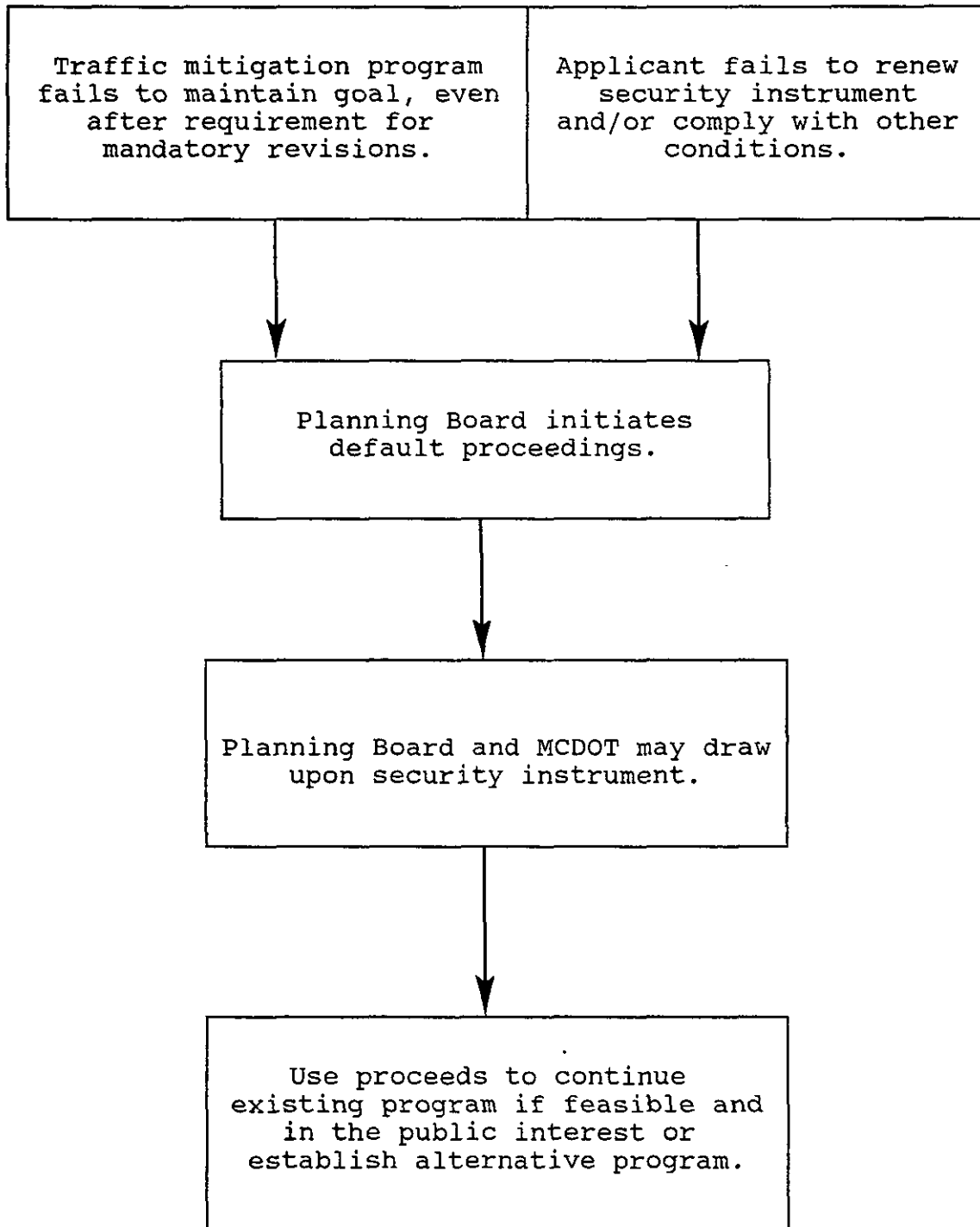
VIII. Defaults

The Planning Board may initiate default proceedings if:

- A. An applicant, after receipt of building permits, fails to meet the traffic mitigation program's timetable for achieving the trip reduction goal, and the applicant's attempts to strengthen the program and/or mandatory revisions required by the Planning Board also fail to achieve the goal.
- B. An operating program, that had previously achieved the trip reduction goal, consistently fails to maintain the goal despite the applicant's attempts to implement mandatory revisions required by the Planning Board.
- C. An applicant fails to renew a security instrument at least three months before its expiration date or otherwise fails to perform in accordance with the terms of the written agreement, and the applicant does not timely cure the deficiency.

In the event of default, the Planning Board and MCDOT may pursue any and all available remedies, including drawing upon the posted security instrument. If a properly posted security instrument is drawn and all proceeds collected by the County, the applicant will be released from further responsibility under the TMA. The entire proceeds of the security instrument shall be used to either continue operation of the program or implement an alternative program acceptable to Planning Board and MCDOT staffs. The County, in considering whether it will utilize proceeds to fund the Program or operate a different trip reduction program, shall determine if the Program, as previously operated by Applicant was successfully achieving the Goal. The County shall endeavor to continue operating a previously successful program unless it determines, in consultation with the Planning Board and after receiving input from known participants of the existing program, that funding the Program is no longer feasible and in the public interest. In all instances, when the County determines that the funds will not be used to operate the Program, the funds must be used to defray the cost of new or expanded traffic mitigation measures designed to accommodate employees or residents in the same policy area within which the Project is located, with emphasis placed upon focusing resources towards meeting the Trip Reduction Goal of the Program.

DEFAULTS



IX. Performance/Securities

- A. The applicant is responsible for maintaining the trip reduction goals and continuing to implement the traffic mitigation program throughout the entire term, unless its successors (including any governmental entity) have agreed in a binding agreement to assume all terms, conditions, and obligations of the applicant. Furthermore, if an on-site component of the program is diminished or terminated, the applicant shall compensate for that situation by strengthening the off-site component of the program.
- B. Each traffic mitigation program must be secured with a letter of credit, performance bond, or other acceptable security instrument. The applicant shall post the initial security instrument with the Planning Board or MCDOT prior to Planning Department staff approval of the release of the proposed development's initial building permit. Generally, the value of the security instrument shall remain fixed until the associated trip reduction goal is consistently achieved and maintained for one year. Assuming the goal is successfully maintained, the value of the security instrument shall decrease by approximately 8% each year, for a period of twelve years.

The initial value of the security instrument to be posted shall be based on:

- 1. the projected cost to the public sector of maintaining the trip reduction goal by implementing the traffic mitigation program for a twelve-year period. The cost shall be calculated by taking into account the anticipated increases in the cost of operating the program due to changes in the consumer price index during that period and the present worth of the projected total twelve-year cost using a discount rate that corresponds to the anticipated money market savings account rate during that period.
- 2. an additional 10% safety factor to allow for unexpected increases in expenses and to help assure that sufficient funds will be available in the event of default.

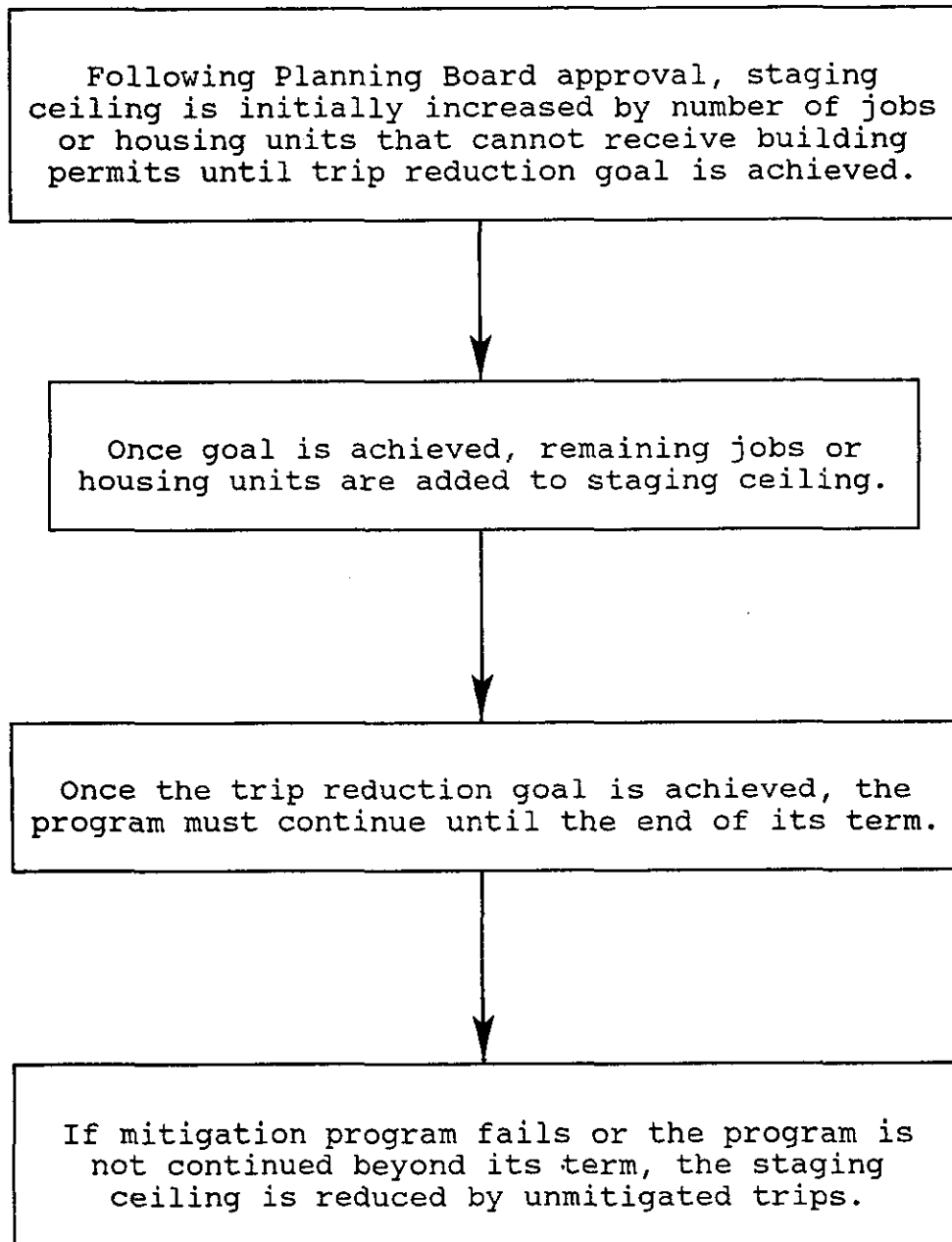
X. Written Agreement

- A. Prior to recordation of an applicant's subdivision, a traffic mitigation agreement including a program attachment must be executed by the applicant, Planning Board, and MCDOT and the agreement must be recorded in the land records of Montgomery County. This agreement shall govern the traffic mitigation program.
- B. The agreement and program attachment shall describe at least all of the types of items required in a traffic mitigation submittal and shall set forth the respective rights, duties, and obligations of the interested parties.

XI. Staging Ceiling Administrative Procedures

- A. Whenever the Planning Board approves a traffic mitigation program that must achieve a trip reduction goal before the Planning Department staff is permitted to approve the release of building permits, the policy area's staging ceiling shall be immediately increased by the amount of jobs and/or housing units exceeding the ceiling due to the applicant's development.
- B. For programs that may defer achievement of a portion of the trip reduction goal until after building permits are released, the staging ceiling shall initially be increased only by the amount of jobs and/or housing units that could not receive building permits until the corresponding trip reduction goal is achieved. Once the goal is achieved, the remaining jobs and/or housing units shall be added to the ceiling.
- C. If a program fails to maintain the goal for a significant period or is not continued by the private or public sector, beyond its term, then the applicant's jobs and/or housing units shall be subtracted from the staging ceiling in proportion to the expected trip reductions that are no longer occurring.

STAGING CEILING ADMINISTRATIVE PROCEDURES



APPROVED FORM

TRAFFIC MITIGATION
AGREEMENT

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TRAFFIC MITIGATION AGREEMENT

This TRAFFIC MITIGATION AGREEMENT ("Agreement") is made on this _____ day of _____, 199_, by and between

I. _____,

() individually

() a _____ corporation,

() a _____ limited partnership, or

() a _____ general partnership ("Applicant"),

II. THE MONTGOMERY COUNTY PLANNING BOARD OF THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, a Maryland public body corporate ("Planning Board" or "M-NCPPC"), and

III. MONTGOMERY COUNTY, MARYLAND, a Maryland charter county (the "County").

RECITALS

This Agreement is entered into on the basis of the following facts, understandings, and intentions of the parties:

A. Applicant is the owner of a certain _____ acre tract of land, more particularly described on Exhibit "A", attached and made a part of this Agreement ("Property"). The Property is situated in the _____ Policy Area of Montgomery County, Maryland.

B. Applicant proposed certain development of _____ ("Project") on the Property necessitating preliminary plan of subdivision approval by the Planning Board. Applicant, therefore, submitted an Application for Preliminary Plan of Subdivision which was captioned Preliminary Plan 1-_____ ("Preliminary Plan").

C. In reviewing any preliminary plan, the Planning Board, pursuant to the Subdivision Regulations (Chapter 50, Montgomery County Code) and the Zoning Ordinance (Chapter 59, Montgomery County Code) as well as all other applicable, approved and adopted, rules, regulations, and traffic mitigation guidelines, must determine that, among other matters, the Project will not overburden supporting public facilities, including transportation facilities. In applying this Adequate Public Facilities Ordinance review (the

"APFO") to the Project, the parties agreed that certain vehicle trips generated by the Project would not be adequately supported by existing or programmed public transportation facilities. To secure approval of the Preliminary Plan, the Applicant agreed to develop, implement, and successfully operate a traffic mitigation program designed to offset the impact created by single-occupancy vehicle trips operated during the peak hour not otherwise supported by public transportation facilities, which would be generated by the Project ("Traffic Mitigation Program" or "Program"). The components of the Traffic Mitigation Program are set forth on Exhibit _____ entitled Traffic Mitigation Program Attachment ("Program Attachment"), which is incorporated and expressly made a part of this Agreement.

D. As an express condition of its written opinion approving the Preliminary Plan, a copy of which is attached as Exhibit _____, the Planning Board required the Applicant to enter into this Agreement with the Planning Board, providing, generally, for the creation, operation, monitoring, and enforcement of the Traffic Mitigation Program for a specific term. The Agreement establishes the respective rights and responsibilities of the parties, including the broad, non-exclusive range of remedies available to the parties in the event of default.

E. The parties recognize that a primary purpose of this Agreement is to ensure that Applicant, following Applicant's occupancy of the Project and creation of the impact sought to be offset by operation of the Program, undertakes its best efforts to operate the Traffic Mitigation Program so that the Trip Reduction Goal will continue to be achieved and maintained. Prior to pursuing other available remedies, in the event the Goal is not achieved or maintained, the Planning Board, after a public hearing, may reasonably require Applicant to revise some or all of the components of the Program in an effort to achieve compliance with the Goal.

F. The Planning Board and County desire to be assured and Applicant is willing to provide such assurance to the Planning Board and County, to the extent legally permissible, that if the Property, in whole or part, becomes part of any new or existing validly formed incorporated municipality ("Municipality"), including a Municipality having planning, zoning, and subdivision authority over the Property, the Applicant will continue to operate the program and maintain the Goal. The parties recognize that the traffic mitigation measures called for herein and the assurance that they will be followed for the defined term of the Program are necessary so that the Planning Board may determine that facilities would currently be adequate and will continue to remain adequate to accommodate the impact expected to be created by the proposed development and, therefore, may approve the Applicant's preliminary plan. In the absence of such assurances, the application could not be approved.

NOW THEREFORE, in good consideration of the mutual promises and stipulations set forth herein, including the foregoing recitals which are expressly made a part of this Agreement, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties, their successors and assigns hereby agree to all of the following terms, conditions, requirements, and limitations.

SECTION 1 - DEFINITIONS.

The terms listed below are utilized throughout this Agreement. A general definition of each term and/or an indication of the location, within this Agreement, that the term is defined in its context, follows:

"Annual Evaluation" - a yearly examination/review of the progress of the traffic mitigation program in meeting its trip reduction goal, performed by the applicant.

"Audit" - a periodic traffic count, survey, or examination to verify the tallies reported by the applicant, performed by or on behalf of the Montgomery County Planning Department.

"APFO" or "Adequate Public Facilities Ordinance" - A requirement pursuant to Section 50-35(K) of the Montgomery County Subdivision Regulations for the Planning Board to determine that the project contemplated in the Preliminary Plan, if approved, would not overburden supporting public facilities, including transportation facilities.

"Applicant's Surveys or Tallies" - Periodic reports, compiled and certified by Applicant, which demonstrate actual utilization of the Program and Goal Compliance, as more particularly described in Subsection 5.02 of this Agreement.

"Commencement Date" - The date that begins the period of time during which Applicant's operation of the Program and maintenance of the Goal may be monitored and enforced, as more particularly described in Subsection 4.01 of this Agreement.

"Event of Default" - An alleged breach of this Agreement by Applicant, as more particularly described in Subsection 7.01 of this Agreement.

"Event of Non-compliance" - A finding made by the Planning Board staff and MCDOT staff relative to the Applicant's operation of the Program and/or Goal achievement or maintenance, as more particularly described in Subsection 6.01.

"Housing and/or Jobs Staging Ceilings" - as defined in the Annual Growth Policy, the maximum amount of development in terms of jobs and housing units that can be accommodated by existing and programmed transportation facilities serving a policy area

"Initial Security Instrument" - The initial balance of the financial security instrument which the Applicant is required to post, as more particularly described in Subsection 9.01 of this Agreement.

"Mandatory Revision" - Changes to the Program and/or this Agreement required by the Planning Board upon a determination that the Applicant is not complying with the Program and/or Agreement, as more particularly described in Section 6 of this Agreement.

"MCDOT" - The Montgomery County Department of Transportation

"Municipality" - A political subdivision validly formed in accordance with the laws of the State of Maryland.

"Notice of Default" - Notification issued to Applicant advising that an alleged Event of Default with certain terms and conditions of this Agreement may have occurred, as more particularly described in Subsection 7.02 of this Agreement.

"Notice of Non-compliance" - Notification issued to Applicant advising that an alleged event of non-compliance with certain of the terms and conditions of this Agreement may have occurred, as more particularly described in Subsection 6.01(b) of this Agreement.

"Off-site traffic mitigation measure" - A traffic mitigation measure which removes trips that would otherwise be generated by existing development located in the general vicinity of the proposed project, rather than from the proposed project.

"On-site traffic mitigation measure" - A traffic mitigation measure which removes trips that would otherwise be generated by the proposed project.

"Peak direction" - The direction of heaviest vehicle use, either entering or exiting the particular project.

"Peak hour" - The generalized peak one-hour interval during which a project is expected to produce the greatest amount of site-generated traffic within the morning and evening peak periods.

"Phased Security Balance" - A calculation indicating the pro rata balance of a security instrument which is to be posted by Applicant to cover the cost of operating various phases of the Program, as more particularly described in Subsection 4.02 of this Agreement.

"Piggybacking" - strengthening and extending a privately-sponsored off-site traffic mitigation measure that already exists, in conjunction with approval of a new preliminary plan application.

"Policy Area" - the County is currently divided into 22 policy areas, plus rural areas, to measure transportation capacity. The policy area boundaries are based on physical features such as rivers, parks, and freeways and on the similarity of their transportation characteristics. The transportation capacity test looks at both the upstream and downstream traffic impacts of existing development plus approved but unbuilt new development. An average level of service (LOS) standard is assigned to each policy area. The standard permits greater traffic congestion in areas where more transit is available as an alternative to the automobile. The transportation LOS test is used to determine whether there is sufficient capacity to accommodate any new development in the policy area

"Preliminary Plan" - A certain application for preliminary plan of subdivision filed by Applicant on the Property, as more particularly described in Recital B of this Agreement.

"Program Attachment" - An attachment to this Agreement that indicates various binding details concerning the Traffic Mitigation Program, which are incorporated into the Agreement.

"Program Information" - Information previously utilized by Applicant in connection with its operation of the Program, including the assistance of personnel previously operating the Program, which is to be made available to the County upon request, as more particularly described in Subsection 8.04 of this Agreement.

"Property" - That certain tract of land described on Exhibit "A", owned by Applicant, that is the subject of a certain application for preliminary plan of subdivision.

"Replacement Security Instrument" - Security instruments that Applicant must post prior to the expiration of an existing security instrument, as more particularly described in Subsection 9.02.

"Tallies" - accountings of peak-hour trips removed or other data that tracks a traffic mitigation program's success, performed by the applicant

"Term" - The time frame during which the Program is to be in effect and enforceable against the Applicant, as more particularly described in Subsection 4.01 of this Agreement.

"Termination Date" - The date that the operations of the Program, pursuant to the Agreement, expires, as more particularly described in Subsection 4.01 of this Agreement.

"Total peak-hour trips" - The anticipated vehicle demand during the peak hour in the combined peak and non-peak directions.

"Traffic Mitigation Program" or "Program" - A program consisting of on-site and/or off-site traffic mitigation measures developed, implemented and operated by the Applicant which is designed to offset the impact created by a certain number of single-occupancy vehicle trips operated during the peak hour.

"Traffic Mitigation Program Components" - Traffic mitigation measures, comprised of on-site measures and off-site measures that the Applicant will implement and operate to achieve and maintain the trip reduction goal.

"Transportation Coordinator" or "Coordinator" - A person or entity appointed by Applicant to implement and operate the Program, as more particularly described in Subsection 5.01 of this Agreement.

"Trip Reduction Goal" - A certain number of trips to be offset by operation of the Traffic Mitigation Program, as more particularly described in Subsection 2.01 of this Agreement.

"Unacceptable Peak-Hour Levels of Service" - A condition where the ability of existing public transportation facilities intended to serve area traffic is unacceptable due to excessive traffic congestion.

SECTION 2 - THE TRIP REDUCTION GOAL.

2.01 Definition of Trip Reduction Goal. The fundamental purpose of the Program, as required as a condition of the Preliminary Plan, is to create a mechanism that fully offsets, directly or indirectly, all those trips (identified in the context of the Preliminary Plan approval through the application of the Adequate Public Facilities Ordinance), determined to cause unacceptable transportation conditions that are expected to be generated by the Project during the morning and/or evening Peak Hours. The number of trips to be offset or other performance requirement, as identified in the Program Attachment, is the "Trip Reduction Goal" for purposes of this Agreement and shall serve as a performance goal which is to be achieved by operation of various on-site and/or off-site traffic mitigation measures or components as described in Section 3 of this Agreement.

2.02 Achievement of the Trip Reduction Goal. The Applicant may receive building permits for the Project or any portion of the Project when Applicant, as verified by the Planning Board or designee:

- (a) conclusively demonstrates that the required components of the Traffic Mitigation Program are in place and operational; and
- (b) to the extent that may be required by the conditions of the Preliminary Plan, that the required Trip Reduction Goal was achieved.

The Planning Board need not recommend the issuance of the building permit until the Board or designee determines that Applicant has complied with all the applicable terms and conditions of this Agreement that operate as a precondition to the release of such permits. The parties acknowledge that Applicant may be unable to secure any building permits unless and until the Goal or phased portion of the Goal is achieved.

2.03 Phasing the Trip Reduction Goal. If the Planning Board has approved a development phasing schedule in the context of an approval of a Preliminary Plan or Site Plan application, the Applicant may time construction and occupancy of varying portions of the Project to the achievement of approved and established, pro rata fractions of the Trip Reduction Goal associated with that phase of the Project. A description of any approved phasing schedule is set forth in the Program Attachment.

SECTION 3 - COMPONENTS OF THE TRAFFIC MITIGATION PROGRAM.

3.01 Aspects of the Program. The Program shall consist of all those certain operational and/or physical components and measures described in the Program Attachment, which Applicant has developed with the expectation of meeting or exceeding the Trip Reduction Goal.

3.02 Modifying the Program. The components of the Program may be modified by the parties from time to time (1) because of the Applicant's failure to achieve or to maintain the Goal or otherwise operate the Program or (2) for the purpose of improving the operations of the Program. This latter change may reflect changes in employee transportation practices or hours of work, or to incorporate different, more efficient modes of public transportation, ridesharing or other forms of transportation alternatives to single occupancy vehicular travel. A modification may take the form of a change to the Agreement and/or to the Program Attachments.

The Planning Board authorizes staff to negotiate and execute modifications to the components of the Program and/or this Agreement except that only the Board may modify the Goal or the Term of the Program. Any modification proposed by staff shall be placed on the Board's consent calendar and be reviewed by the Board as an informational item.

The modification shall become effective, when reviewed by the Planning Board, executed by the parties and recorded among the County Land Records. The Applicant, if directed by staff, shall endeavor to take reasonable steps to provide notice to generally known users of the Program's components, prior to the time any modifications are effectuated. The notice should advise such users of the proposed notice and effect of its modification, purpose being to give users information conceiving possible program alterations. The requirement to provide notice is not intended to create any new rights under this agreement or applicable law. Applicant's failure to provide notice to a user shall not itself be grounds to annul any modification approved by the Board, provided Applicant has taken reasonable steps to provide general notice. The Applicant shall transmit relevant comments received by such participants to the Planning Board.

The modification agreement shall have the effect of modifying only those terms of this Agreement specifically associated with the modification. All remaining terms shall continue to be given full force and effect.

Applicant must describe how any proposed modification to the Agreement or components of the Program, if approved, when implemented will achieve or maintain the Trip Reduction Goal, is readily capable of being monitored, will not cause an adverse impact on the public health, safety and welfare, and is feasible to implement and operate. Any resulting alteration to the amount or form of the security instrument, if any, shall be promptly posted by Applicant.

3.03 Participation in Comprehensive Transportation Demand Management Program. Applicant, in addition to operating the Program, acknowledges that it may, by duly enacted legislation and/or regulation, be required to participate in programs implemented by the County or State with respect to any applicable regional (beyond the boundaries of Montgomery County) or county (either within a portion of the County or county-wide) transportation demand management plan and strategies adopted by the County

and/or State, including, but not limited to, ridesharing programs and staggered work hours programs that:

- (a) benefit or relate to the Property and the geographic policy or planning areas embracing the Property or portions thereof; and
- (b) are for the purpose of addressing concerns regarding air quality, the conservation of energy resources, or the overall reduction of traffic.

Any legislation implementing such a management plan may indicate whether such management plan is intended to be in addition to or is a full or partial replacement of the Program and, if so, the extent that credits may be available to Applicant in connection with its successful operation of the Program.

SECTION 4 - TERM OF THE TRAFFIC MITIGATION PROGRAM.

4.01 Establishing the Term of the Program and Goal Achievement. The Program shall be effective as of the date of this Agreement and continue until the passage of the final Termination Date as described below ("Term"). The Program shall encompass a period of time prior to goal achievement and goal maintenance to allow Applicant to prepare for and initiate operations of the Program. During this preparation stage the remedies available to the Planning Board and County shall be limited to withholding issuance of building permits and use and occupancy permits as may be provided in this Agreement or the Program Attachment. The term of the Program associated with achievement and maintenance of the Trip Reduction Goal shall commence upon such date as the Applicant conclusively demonstrates, in writing, and Planning Board staff confirms, that the entire, or approved phased portion of, the Trip Reduction Goal for the Project has been fully achieved (the "Commencement Date") and all then applicable requirements under this Agreement, including the posting of any required security instrument in full or in part, if Phased Goal achievement has been approved, have been met. Operation of the Program and maintenance of the Trip Reduction Goal shall remain in effect until the earlier of (the "Termination Date"):

- (a) the expiration of 12 (Twelve) years from the Commencement Date;
- (b) a determination is made by the Planning Board that continuation of the Program is no longer necessary or that operation of the Program no longer remains necessary or in the public interest. This determination may include finding, in accordance with Subsection 3.03 of this Agreement, that all or part of the Goal is being achieved by the Applicant's participation in a transportation demand management program (e.g. a transportation management district or for compliance with the Clean Air Act or other comprehensive policy program). The Applicant must

demonstrate that such a comprehensive program was intended to be in lieu of and not in addition to existing programs;

- (c) termination of the Program and collection of funds under a properly posted security instrument upon a determination of the occurrence of an Event of Default under the provisions of the Agreement; or
- (d) if the program consists exclusively of the provision of a capital transit contribution, upon its acceptance by the County and/or other governmental entity.

Neither the modification or revision to the Program agreed to by the parties or an election by the Planning Board and the County to pursue available remedies (except if an election is made to fully draw upon posted security instruments) unless stated affirmatively in writing, shall constitute an event of termination of this Agreement.

4.02 Setting the Term for Phased Projects. The Program Attachment, if approved by the Planning Board, may provide for the phasing of the construction of the Project. If phasing has been approved, the Program Attachment shall indicate, among other things, the size/amount of development contemplated in each phase. When phasing is utilized, the Applicant must achieve and maintain a pro-rated trip reduction goal for a term associated with that phase. Each Term shall be calculated as provided for in Subsection 4.01. The Commencement Date for a particular phase shall run from the date of full goal achievement for that Phase of the Project and continue until the passage of its associated Termination Date, as provided in the Program Attachment. For multiple phased projects, the terms associated with several phases may overlap.

In the event that phased Goal compliance is approved, Applicant may post security instruments in stages and in such amounts that are equivalent to the reasonably calculated base level costs of the Program (which include start up costs and other costs which are expected to remain constant throughout the operation of the Program irrespective of the number of trips which then represent the Goal) and the cumulative pro rata per trip costs of operating the Program to remove each those trips associated with the phase or phases for which the term has commenced. The base level cost is expected to remain constant in calculating security instruments for each phase. The calculations and schedule for the posting of such the phased security instrument is set forth in the Program Attachment (the "Phased Security Balance"). Only upon the passage of the last Termination Date shall this Agreement be considered to have terminated.

4.03 Satisfaction of APFO Requirements. Upon the good faith performance of all requirements of this Agreement by Applicant and the final termination of the Agreement, the parties agree that such termination shall constitute satisfaction by Applicant of the Planning Board conditions calling for the operation of the Program pursuant to the application of the Adequate Public Facilities Ordinance requirements associated with development of the Project (Chapter §50-35(k), Montgomery County Code, 1972, as amended).

4.04 Notice to MCDOT. The Applicant must advise MCDOT in writing that the term of the Program is set to expire pursuant to Subsection 4.01(a) in accordance with the following noticing schedule:

- (a) three years in advance of the Termination Date, and
- (b) one year in advance of the Termination Date.

Notice shall be directed to MCDOT, with a copy to the Planning Board. Notice shall be deemed to have been validly issued if done so properly at the time given, subsequent suspensions of the Program or extension of the Termination Date shall not invalidate such notice.

SECTION 5 - MONITORING ACHIEVEMENT OF THE PERFORMANCE GOAL.

5.01 The Transportation Coordinator. As part of the Program, the Applicant may be required to designate a Transportation Coordinator (the "Transportation Coordinator" or "Coordinator") responsible, in general, for implementing, operating, promoting, and maintaining the Program. The Coordinator may be an employee of Applicant or Applicant's designee, which may include a professional consulting company or a governmental agency. The Coordinator must have sufficient training and experience to perform the assigned duties and have sufficient support staff. If a Coordinator is required, his/her specific roles are to be delineated in the Program Attachment and must be designated prior to receipt of any building permit.

5.02 Applicant's Surveys/Tallies. The Applicant shall be responsible for conducting periodic surveys and tallies (actual utilization counts) which have been developed to establish actual utilization of the Program to demonstrate achievement of the Trip Reduction Goal prior to building permit release and maintenance of the Goal following permit release (the "Applicant's Surveys"). The survey and tally results shall be presented in writing using a methodology and format approved by Planning Board and MCDOT Staff and shall include as an attachment all collected materials which form the basis of the survey and tally results. Surveys and tallies shall be conducted in accordance with methodology and techniques established from time to time by the Planning Board and/or County. The scope and frequency of the surveys are established in the Program Attachment. Thereafter, less frequent periodic counts may be required if agreed to in writing by the Planning Board staff. Applicant, when seeking to demonstrate Goal

achievement or maintenance, shall verify in writing the accuracy of the Applicant's Surveys and shall cause any person or firm that conducted any counts and/or prepared any tallies to provide an affidavit certifying that the information contained in any submitted survey and tallies is correct to the best of his/her knowledge, information, and belief. The knowing misrepresentation of any information certified to be correct shall be punishable by applicable civil and criminal remedies and relief and may be considered a default under this agreement. Applicant shall promptly provide copies of the surveys to the Planning Board and MCDOT for joint review of the counts.

5.03 Annual Report. Beginning one year from the Commencement Date and continuing on each subsequent anniversary date for the entire term of the Program, the Applicant shall cause to be prepared a written, annual report summarizing the effectiveness of the Program in achieving and maintaining the Trip Reduction Goal based on surveys, reports, and other relevant information. Inferences that relate to continued maintenance of the Trip Reduction Goal shall be drawn over three month periods. The report should reasonably attempt to disclose information related to the possible future inability of the Applicant to continue operating the Program and/or achieving or maintaining the Goal. The report may make recommendations or proposals to revise the Program if a determination is made that circumstances may preclude future Goal achievement or maintenance. Applicant shall verify in writing the accuracy of any submitted report and shall cause any person or firm who prepared the Annual Report to provide an affidavit certifying that the information contained in the report is correct to the best of his/her knowledge, information, and belief.

5.04 Planning Board Audits. In addition to surveys undertaken by Applicant, the Planning Board staff may conduct or cause to be conducted certain periodic, unscheduled audits of some or all of the operational aspects of the Program. The frequency and scope of such audits shall be detailed in the Program Attachment and shall be reasonably crafted to provide a fair, impartial accounting of Applicant's compliance (achievement and maintenance) with the Goal. The purpose of these audits is to help measure the accuracy of Applicant's tallies in making determinations as to maintenance of the Trip Reduction Goal. Copies of the results of the Planning Board audits shall be promptly sent to Applicant and MCDOT. If inconsistencies appear between counts derived by Applicant and those derived by Planning Board audits, staff and the Applicant shall meet to discuss these inconsistencies and determine the correct numbers and, if necessary, implement corrective measures as provided in Section 6.

Beginning with the Commencement Date, and continuing for the term of the Agreement, the Applicant shall deliver to the Planning Board a certain sum in the form of a check payable to M-NCPPC, to offset the reasonable costs incurred or expected to be incurred by the Commission for the cost of conducting and administering periodic audits of some or all of the operational components of the Program. The initial payment shall be an estimate of the cost of

conducting at least twelve audits (the "Audit Fund"). Thereafter, payments in amounts that re-achieve the full twelve month Audit Fund and cover sums expended by the Planning Board to conduct and administer audits during the prior calendar year (the "Replacement Audit Payments") shall be promptly delivered on or before January 2 of each succeeding year until the Termination Date. The Replacement Audit Payments shall be adjusted for inflation on an annual basis based upon the Consumer Price Index published periodically in the Wall Street Journal. If the amount originally estimated and paid over to cover the cost of the audits for any particular term proves to be insufficient to conduct necessary audits, Applicant, within thirty days of receipt of written notice from the Planning Board staff, shall deliver a supplemental check payable to M-NCPPC to cover the deficiency. Applicant may request a meeting with staff to discuss any proposed variation in the cost to be paid. The staff shall send Applicant a copy of all paid invoices within a reasonable period following payment. Amounts remaining in the Commission account which are not expended for all accrued but unpaid fees and expenses during an annual period may be rolled over and credited to the next annual period or refunded to Applicant if the Program has been terminated as provided in this Agreement.

5.05 Governmental Reviews. The Planning Board Staff and MCDOT shall review the results of Applicant's Survey's and periodic tallies, the Annual Report, and any Planning Board Audits. The purpose of the review is to assist the government in making a determination as to whether the Program is achieving or continuing to maintain the Trip Reduction Goal. Staff will average the information and counts over two-month periods to determine Goal Achievement and three months for Goal Maintenance.

SECTION 6 - NON-COMPLIANCE WITH THE TRIP REDUCTION GOAL.

6.01 Notice of Non-compliance.

- (a) An "Event of Non-compliance" shall be noted if, on the basis of a tally, survey, audit, Annual Report or other pertinent information, the Planning Board staff, after consultation with MCDOT, determines that Applicant has:
 - i. not been operating the Program in conformance with this Agreement; or
 - ii. not maintained or (if deferral of Goal achievement as averaged over requisite was approved) achieved the Trip Reduction Goal as averaged over the requisite number of months (and informal meetings with Applicant fail to resolve discrepancies in trip counts) then,

(b) Staff may:

- i. promptly notify Applicant in writing, of its determination of an occurrence of an Event of Non-compliance and attach to such notice a list, compiled by the Staff, of relevant information forming the basis of determined noncompliance set forth in such notice (the "Notice of Non-compliance");
- if. the Notice of Non-compliance will establish a tentative meeting date and time among Applicant, Planning Board Staff and MCDOT Staff which is to take place at the M-NCPPC offices within thirty days of the date the Notice of Non-compliance is sent or such other mutually convenient time agreed to by the parties.

6.02 Staff and Applicant Pre-Hearing Meeting. Any meeting called pursuant to Section 6.01 shall be intended to facilitate discussions among the Planning Board Staff, MCDOT Staff and the Applicant about the proposed finding of an Event of Non-compliance. The parties shall discuss whether the information forming the basis of the determination of an event of non-compliance is correct and, if so, determine if the failure to maintain the Goal is a temporary aberration or likely to be a permanent occurrence. Unless the Applicant disagrees with the finding that the Program is not in compliance, and/or is a permanent occurrence, the parties shall determine if mutually agreeable revisions to the components of the Program can be identified which are feasible to implement, monitor, and, if utilized, have a reasonable likelihood of bringing the Program into conformance with the Trip Reduction Goal. If agreement is reached, this Agreement may be modified as provided in Section 6.03.

If good faith negotiations fail to produce a mutually acceptable revision to the Program, Staff may propose certain, reasonable additional or alternative methods for operating the existing Program or suggest other components designed to facilitate goal achievement and maintenance which shall be reviewed by the Planning Board pursuant to Section 6.04. Any proposed modification by Staff shall be feasible and must give due consideration to additional operational costs, if any, which may then have to be incurred by Applicant.

6.03 Staff Modification. If Applicant and the Staff arrive at a mutually agreeable resolution of the Event of Noncompliance, the Applicant and the Staff shall amend the Agreement as provided for in Section 3.02.

6.04 Planning Board Hearing. If Applicant, the Planning Board Staff, and MCDOT Staff:

- (a) cannot arrive at a mutually agreeable resolution correcting the Event of Non-compliance, or

- (b) The Applicant disagrees that the Program, as then operating, is or has been in non-compliance,

then Staff shall, upon no less than ten (10) days written notice, schedule a public hearing with the Planning Board during its next available regular session. Applicant shall endeavor to take reasonable steps to provide general notice to known users, if any, of the operating program by reasonable means determined by Applicant. The purpose of providing notice to users is for their informational purposes, not for the purpose of creating any new rights under this Agreement or applicable law for such users.

Applicant shall have the right to appear before the Planning Board to contest or offer information about the Notice of Non-compliance, any mitigating circumstances, and any proposed modifications to the Program.

6.05 Planning Board Action. Following the public hearing called for in Section 6.04, after giving due consideration to the evidence presented by Applicant and upon the recommendation offered by Planning Board Staff and MCDOT Staff, the Planning Board may determine that:

- (a) Applicant is in compliance with the Program and is achieving the Performance Goal; or
- (b) Applicant is not in compliance (either due to Applicant's failure to operate the Program or, in spite of Applicant's good faith efforts to operate the Program, the Goal is not achieved or maintained) and, therefore, the Applicant must take particular steps necessary to cure the Event of Noncompliance, which may include modifying some or all of the components of the Program as provided in Subsection 6.06.
- (c) Applicant has failed to cure the Event of Noncompliance in which case the Planning Board may give notice, in writing, to Applicant that the Planning Board and the County, after the expiration of any reasonable cure period as set forth in the Notice, are then entitled to and shall pursue all remedies then available as set forth in this Agreement;
- (d) Such other facts exist which the Planning Board will resolve on a case by case basis.

6.06 Requirement for Mandatory Revision. In the event that the Planning Board determines that the Applicant is not in compliance with this Agreement as provided in Subsection 6.05(b), the Planning Board may require the Applicant to revise some or all of the components of the Program in a manner determined to be necessary by the Board ("Mandatory Revision").

(a) Notice of Mandatory Revision.

If the Board requires mandatory revision, the Board shall give written guidance to Applicant as to the type of mandatory revisions it deems appropriate. In determining the nature of such mandatory revisions, the Board shall give due consideration to such factors as the additional costs which may be incurred, the feasibility of implementing the revisions, and the likelihood of the Program, as revised, achieving the Performance Goal.

(b) Cost Limitations for Additional Measures.

When the Planning Board determines that Applicant must implement new and/or additional traffic mitigation measures/components, the Planning Board will require Applicant to implement only such additional measures that limit the total operational costs of the revised Program to no greater than 150% of its operational costs. Applicant shall provide cost evaluations and estimates for the real operations of both the existing measures and the proposed measures and other pertinent information requested by the Board. Cost information should be in current dollars and reflect costs expected to be incurred if the Programs components were fully operational.

(c) Implementation of Additional Measures.

Applicant shall have thirty days from the date of the Planning Board's written decision on the revision to submit a revised Program Attachment or other mutually acceptable, written modification, amending this Agreement as appropriate. Planning Board Staff and MCDOT staff shall cooperate in an expedited manner with Applicant in reviewing, commenting, and processing the modification. The Modification Agreement Planning Board shall provide the Applicant with a reasonable period of time of no less than thirty (30) days and no more than one hundred eighty (180) days from the date of the Board action to implement required revisions.

(d) Effect of Mandatory Revision on other Requirements.

The Planning Board shall stay the running of the Term of Goal achievement or maintenance and the Program from the date of its action to revise during the period that the Goal is not attained. Applicant may produce evidence to establish that the Program, as revised, has re-attained the Goal, and otherwise complied with the Board's revision, which upon the date that Staff promptly determines goal achievement has been re-attained, the Term of

the Program shall commence once more. The Applicant shall hold constant and not allow to decline the amount of the security instrument then posted until such time as the additional measures are implemented and the Goal re-achieved. Upon re-achievement, the amount of the security instrument shall be adjusted to reflect the costs associated with the additional measures.

6.07 Purpose of Mandatory Revision. The parties acknowledge that the purpose of this Section 6 is to provide a means which enable the parties to revisit the operations of a Program which is not achieving or maintaining the Trip Reduction Goal. A purpose of this Agreement is to ensure that the Applicant operates a Program utilizing its best faith efforts that achieves or attempts in good faith to achieve the Goal. This Agreement only contemplates the Planning Board or the County calling upon the required security instrument, as provided in Section 9 and, thereafter, assuming the responsibility for operating the Program in the event that Applicant is no longer capable of operating the Program or after all feasible and practical remedies which the Planning Board and the County may have elected to pursue have not cured an Event of Noncompliance. The Applicant, initially, has great latitude in devising a Program which Applicant believes will achieve the Trip Reduction Goal. Only after Applicant has achieved the Goal and is allowed to construct and occupy the Project, in whole or in part, enabling its impact to otherwise be felt on area transportation facilities, and subsequent events show that the Applicant's assumptions or calculations related to the ability of the Program to achieve the Goal may not be fully realized, will the Planning Board, in the interest of protecting the health, safety, and welfare of residents and workers, intervene and require Applicant to revise the Program as necessary to achieve the Goal. This approach allows for a cooperative, prompt, and focused process to identify and resolve an Event of Non-compliance consistent with the expectations of the Planning Board in approving the Preliminary Plan.

SECTION 7 - EVENT OF DEFAULT.

7.01 Defining an Event of Default. An "Event of Default" shall have occurred upon a determination, after due notice and public hearing, by the Planning Board, in consultation with MCDOT, that:

- (a) The Applicant has not timely achieved or, once attained, failed to maintain the Goal and, if applicable, has failed to timely revise and implement the Program in accordance with the determinations made by the Planning Board pursuant to Subsection 6.05.

- (b) The Applicant, after notice and a reasonable opportunity to cure, has failed to timely provide any reports, tallies, or surveys in a form and containing all information called for by the Agreement or has failed to post any necessary funds, called for under the Agreement, to defray costs incurred by M-NCPPC.
- (c) The Applicant has failed to respond in a reasonable period of time to any notice or requests to produce materials as may be called for in the Agreement where such requests are material to the operations, monitoring, and enforcement of the Program.
- (d) The Applicant has failed to timely post a required Security Instrument or Replacement Security Instrument as required in Section 9.
- (e) The Applicant has wilfully misrepresented any recital, statement, affirmation and the like in this Agreement or has wilfully misrepresented or concealed any relevant information about the operations of the Program or achievement of the Goal.
- (f) The Applicant, upon due notice and reasonable opportunity to cure, shall have breached any other provision of this Agreement.

7.02 Notice of an Event of Default. Planning Board Staff in consultation with MCDOT Staff, shall make a preliminary determination that an Event of Default has occurred. Upon making such determination, the Planning Board staff shall notify Applicant in writing of its determination that an alleged Event of Default may have occurred ("Notice of Default"). The Notice of Default shall specify each particular default, list all remedial measures which Applicant must take to eliminate the default, and state a reasonable period of time as determined by Staff (no less than ten (10) days and no greater than ninety (90) days) to cure the alleged Event of Default. The Notice of Default shall provide that Applicant shall have the right to appear before the Planning Board to contest or seek clarification of the determination of a default. If the determination of an occurrence of an Event of Default is based upon a preliminary determination by Planning Board Staff that Applicant has failed to implement revisions to the Program within the time frame previously established by the Planning Board as called for in Sub-Section 6.05, then the Notice may state that the Planning Board and County, after public hearing, may pursue all available remedies without further cure period.

7.03 Applicant's Response. Applicant, within fifteen days of receiving the Notice of Default, shall direct a written response to Planning Board staff. The response may:

- (a) indicate that Applicant is aware of the Event of Default and will cure it within the time frame established in the Notice;
- (b) request such additional time which is reasonably necessary to cure the default; or
- (c) request a hearing before the Planning Board to contest the finding of an alleged Event of Default.

7.04 Planning Board Hearing. Upon request of Applicant, Planning Board Staff or MCDOT Staff, the Planning Board shall conduct a hearing, upon ten days written notice to Applicant to determine whether an Event of Default has occurred. At the hearing the parties may present relevant evidence. If the Board finds that an Event of Default has occurred, the Board may instruct staff to pursue any and all available remedies or require Applicant to either implement the approved Program within an established time frame or revise the Program and/or this Agreement accordingly as provided in Section 6 of this Agreement.

7.05 Applicant's Conduct During Cure Period or Pre-Hearing. Applicant, during the Cure Period reasonably established in the Notice of Default, shall continue to operate the Program and otherwise adhere to all of the terms and conditions of this Agreement, diligently and in good faith, including, without limitation, continuing to submit Applicant's Surveys and reports, and maintaining and posting security instruments as they become due. Failure to maintain or post a required security instrument as it becomes due, shall constitute a material breach of this Agreement by Applicant and entitle the County to immediately draw upon the then posted security instrument in the manner provided for in this Agreement without regard to any cure period and without limiting the availability of any other remedies.

SECTION 8 - REMEDIES.

8.01 Election of Remedies; Available Remedies. In the case of an Event of Default, following the issuance of all required notices, and the expiration of any applicable grace and cure periods, the Planning Board and the County may pursue as its non-exclusive recourse any and all available remedies provided for at law or in equity, including specific performance (given the unique nature associated with operating the Program). The remedies shall include the ability to issue civil fines, penalties, and stop work orders to the extent authorized by law, and to draw upon any Security Instrument as provided in Section 9.

8.02 No Exclusion of Remedies. No right, power, or remedy conferred upon or reserved to the Planning Board or County by this Agreement (unless the elected remedy is to pursue a security instrument) is intended to exclude any other right, power, or remedy, but each and every such right, power, and remedy shall be cumulative and concurrent and shall be in addition to any other

right, power, and remedy given under this Agreement, or as may now or hereafter exist at law or in equity or by statute.

8.03 No Waiver. Any failure by the Planning Board or County to insist upon the strict performance by the Applicant of any of the terms, conditions, covenants, agreements and provisions hereof shall not be deemed to be a waiver of any of such terms, covenants, agreements, conditions and provisions. Notwithstanding any such failure, the Planning Board and County shall have the right thereafter to insist upon the strict performance by the Applicant of any and all of the terms, covenants, agreements, provisions and conditions to be performed and observed under this Agreement.

8.04 Drawing Upon Security Instrument.

- (a) The Planning Board and County, in lieu of any other remedy it may have under this Agreement, may elect, following all notice, grace and cure periods provided herein, to immediately draw upon any security instrument which Applicant may have posted in accordance with Subsection 9. In such event, the Planning Board shall delegate to the County all authority for utilizing the funds thereby collected to either operate the Program in full or in part or to fund an alternative trip mitigation program. The County, in considering whether it will utilize proceeds to fund the Program or operate a different trip reduction program, shall determine if the Program, as previously operated by Applicant, was successfully achieving the Goal. The County shall endeavor to continue operating a previously successful program unless it determines, in consultation with the Planning Board and after receiving input from known participants/users of the existing Program, that funding the Program is no longer feasible and in the public interest. In all instances, when the County determines that the funds will not be used to operate the Program, the funds must be used to defray the cost of new or expanded traffic mitigation measures designed to accommodate employees or residents in the same policy area within which the Project is located, with emphasis placed upon focusing resources towards meeting the Trip Reduction Goal of the Program.
- (b) A determination by the County to operate any trip reduction program is not intended to be relied upon or create any third party beneficiary nor lay the basis for any cause of action by any third party against the Planning Board or the County for any reason, including a failure to provide a traffic mitigation program that is equivalent to or similar to the Program upon which such persons may previously have relied for commuting, employment, or any other reason.

- (c) If this Agreement is terminated and a determination is made to collect the proceeds of the security instrument, Applicant, upon request of the County or the Planning Board, shall: (i) immediately deliver to the County free and clear of any liens or encumbrances and without charge, all computer software, commuter locator maps, cards, lists and other similar materials used for the operating, marketing, and processing of the Program owned by Applicant; provided, however, nothing herein shall require Applicant to disclose to the Planning Board or County any confidential personnel, commercial, financial or employment information, or any other data which might constitute an unwarranted invasion of personal privacy or trade or business secrets; and (ii) for sixty (60) days following the termination of this Agreement, Applicant shall make reasonably available to the County, on an as needed basis, the assistance of a person who is familiar with the Program to assist the County in attempting to continue operations of the Program in whole or part (collectively "Program Information").
- (d) Upon receipt of all proceeds from the security instrument by the County, the Applicant's duties and obligations under this Agreement, except as may otherwise be provided in this Agreement, shall terminate.

SECTION 9 - SECURITY INSTRUMENT.

9.01 Applicant to Post Initial Security Instrument. Prior to Applicant's receipt of any initial building permit for the construction of the improvements contemplated in the Preliminary Plan, Applicant shall post with the County an unconditional and irrevocable bond or letter of credit or other acceptable security instrument in the amount as set forth in the Program Attachment (the "Initial Security Instrument"). If phased development and phased Goal Achievement is contemplated and approved, Applicant shall post a security instrument equivalent to the Phased Security Balance. Applicant at all times must have posted and maintained a security instrument that fully covers the anticipated cost of operating the Program to offset the number of trips associated with each phase for which a term has commenced for the balance of its respective terms.

Applicant warrants, to the best of its knowledge, information, and belief, that the amount established for the Initial Security Instrument is Applicant's good faith estimate of the actual net cost to the County of operating the Program for the full term of the Program as required by the Planning Board. Further, Applicant, in good faith, warrants, to the best of its knowledge, information and belief, that the submitted Initial Security Instrument, or any Replacement Security Instrument, will be unconditional and

irrevocable, in standard commercial form, and thereby will have no unusual impediments to collection on the instrument.

The Initial Security Instrument shall have an expiration date no earlier than twelve (12) months from the date the Security Instrument was posted. Such Initial Security Instrument shall include a provision that the instrument is to be returned to Applicant promptly upon written request to the County after termination of this Agreement, where no breach has occurred. If such instrument is not returned immediately, Applicant is authorized to cancel such instrument and to otherwise prevent it from being negotiated or otherwise used contrary to this Agreement by submitting a notarized statement to the drawee bank or other lending or bonding institution, and its assigns shall rely upon such statement and shall not be held liable to the Government or any other person for relying upon such statement.

9.02 Replacement Security Instruments. Nine (9) months after the posting of the Initial Security Instrument and every twelve (12) months anniversary of the posting date thereafter during the term of this Agreement, where the Security Instrument does not have automatic renewal provisions, Applicant shall deliver to the County a new Replacement Security Instrument in the amount shown in the schedule contained in the Program Attachment ("Replacement Security Instrument"). Each Replacement Security Instrument shall be in substitution for and be effective at the expiration of the Security Instrument posted by Applicant for the just-ended twelve (12) month period. Each Replacement Security Instrument shall have a duration of twelve (12) months and shall otherwise be in the same form as the Initial Security Instrument. Upon receipt and acceptance of a Replacement Security Instrument, the County shall immediately release to Applicant for cancellation the Security Instrument posted by Applicant for the just-ended twelve (12) month period.

9.03 Failure to Post Replacement Security Instrument. In all events, each Replacement Security Instrument shall be submitted by Applicant to the County at least ninety (90) days prior to the expiration date of its last posted bond or letter of credit. Notwithstanding anything stated herein to the contrary, if Applicant fails to submit each Replacement Security Instrument and such failure continues for a period of thirty (30) days, Applicant may be declared to be in default under this Agreement. In that event, the Director of MCDOT shall notify Applicant in writing that Applicant is in default. The County may demand Applicant to post Replacement Security Instrument and immediately pursue other available remedies under this Agreement or, without any further grace period whatsoever, draw upon the bond or letter of credit which it then holds and use its proceeds as provided for in Section 8.04(a). Further, the County shall then be entitled to obtain the Program Information.

9.04 Drawing Upon A Security Instrument. All Security Instruments posted under this Agreement shall stand as security for performance by Applicant of its obligations under this Agreement. Each Security Instrument shall provide that it may be drawn upon

when the draft is accompanied by a written, notarized statement, executed by the Chairman of the Planning Board and the Director of MCDOT, and that the County is authorized to draw upon the Initial Security Instrument or the Replacement Security Instrument as the result of an Event of Default, following the expiration of any applicable cure period or as the result of the failure to provide a Replacement Security Instrument as set forth herein.

9.05 Applicant's Subcontractors To Participate Upon Request. Any and all agreements by Applicant let to any party to undertake any or all operational components of the Program shall contain the provision that the Applicant's rights and obligations under such agreement may be freely assigned to the County or its designee upon the same terms and conditions at the option of the County. In the event the County draws upon a Security Instrument, Applicant agrees, upon the written request of the County, to immediately assign its rights and obligations under such agreement to the County. An Agreement between the Applicant and a contractor of Applicant shall also provide that neither the County or Planning Board is per se obligated to be bound by the terms of any existing contract or agreement that Applicant may have entered into with any party to provide services related to the operation of the Program.

9.06 Security Instrument To Be Returned To Applicant Upon Termination of Agreement. Upon termination of this Agreement pursuant to Subsection 4.01, any Security Instrument then held by the County shall be returned to Applicant for cancellation within thirty days of the Termination Date. If such Security Instrument is not timely returned, Applicant, upon written notice to the County, is hereby authorized to cancel such Security Instrument and to otherwise prevent it from being negotiated or otherwise used contrary to this Agreement.

SECTION 10 - ANNEXATION AND INCORPORATION.

The incorporation or annexation of all or a portion of the Property within any Municipality, including a municipality having planning, zoning, and subdivision authority over the Property, shall not relieve Applicant of any obligation under this Agreement to operate the Program. All of the benefits and rights of the Planning Board and County hereunder shall survive such annexation. Applicant, prior to any public hearing on an annexation petition for the Property or portion thereof must advise the Municipality of the existence of this Agreement and this survivability provision. Applicant's obligations under this Agreement should be in addition to any obligations imposed by the Municipality at the time of annexation.

SECTION 11 - APPLICANTS/OWNERS REPRESENTATIONS AND WARRANTIES.

11.01 Best Efforts. Applicant understands that the Planning Board approved the Preliminary Plan only with the understanding that Applicant was committing its best efforts into operating a traffic mitigation program which would meet or exceed the Trip Reduction Goal. To this end, Applicant, the Planning Board and its

staff, and MCDOT pledge to perform their respective duties and obligations set forth in this Agreement in good faith. In general, it is the primary intention of the parties that Applicant establish and successfully operate a traffic mitigation program; not for the County or Planning Board to assume management of the Program, unless and only until a determination is made by the Planning Board and County that Applicant is not reasonably able to operate a reasonable program that will achieve the Performance Goal.

11.02 Authority to Act. If Applicant is a corporation, limited partnership, or general partnership, Applicant certifies as follows:

- (a) Applicant is a duly formed corporation or partnership, organized and validly existing, in good standing, under the laws of the State of Maryland, and if not a Maryland corporation or partnership is qualified to do business in Maryland.
- (b) Applicant has full power and authority, under the terms of the documents creating it and other applicable laws and regulations, to have submitted the Property to the Planning Board for Preliminary Plan Review and to enter into this Traffic Mitigation Agreement.
- (c) Applicant, with respect to this Agreement, has full authority to execute and deliver the Agreement and to incur and perform the obligations provided for therein, the consummation of this transaction having been duly authorized by all proper and necessary actions under the corporate or partnership documents.
- (d) Applicant is not currently engaged in any litigation or dispute which could lead to litigation before any court or administrative body that could materially and adversely affect the ability of the Applicant to perform its obligations under the Agreement or affect the ability of the Planning Board or County to enforce the Agreement as provided herein.

11.03 Ownership of Property. Applicant at the time of the execution and delivery of this Agreement is the absolute and lawful fee simple owner of the Property, having legal, equitable, and beneficial title to, and is lawfully seized and possessed of, the Property.

11.04 Annexation. Applicant, as of the date of this Agreement, is not actively pursuing the initiation of a Petition for Annexation of all or a portion of the Property into any Municipality and is not aware of any proposal by any Municipality to annex all or a portion of the Property.

SECTION 12 - MISCELLANEOUS PROVISIONS.

12.01 Recordation of the Agreement. This Agreement may be recorded among the Land Records of Montgomery County, Maryland.

12.02 Entire Agreement. This Agreement, including all exhibits hereto, constitutes the entire agreement among the parties and no party is liable to the other or bound in any manner by express or implied warranties, guarantees, promises, statements or representations as expressly and specifically set forth in this Agreement.

12.03 Counterparts. This Agreement may be executed simultaneously in any number of counterparts, each of which shall be deemed an original but all of which shall constitute the same Agreement.

12.04 Amendments/Modifications. This Agreement may only be modified if agreed to by the parties or their designee hereunder, reduced to a mutually acceptable written document, and recorded among the aforesaid land records. Amendments which are deemed by the parties to materially alter the agreement and are inconsistent with its terms must be approved by the Director of MCDOT and the Planning Board. Any other modifications may be approved by Planning Board Staff, on behalf of the Planning Board and MCDOT Staff on behalf of the County.

12.05 Governing Law. All questions with respect to the construction of this Agreement and the rights, remedies and liabilities of the parties shall be determined in accordance with the laws of the State of Maryland.

12.06 Severability/Partial Invalidity Superseded by Subsequent Laws or Judicial Action. If any term, covenant or condition of this Agreement or its application to any person or circumstances shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected, and each term shall be valid and enforceable to the fullest extent permitted by law, unless by such application of the affected term, compliance with the material purposes of this Agreement may no longer be fulfilled.

12.07 Suspension Due To Subsequent Laws or Judicial Action. The provisions of this Agreement shall be modified or suspended by the Planning Board and County as may be necessary to comply with any new laws or decision issued by a court of competent jurisdiction ("Decision"), enacted or made after the Effective Date which prevents or precludes substantial, material compliance with one or more provisions of this Agreement. Immediately after enactment of any such new law, or issuance of a Decision, the parties shall meet, upon notice being sent by Planning Board Staff and MCDOT Staff, and confer in good faith in order to agree upon the form of such modification or suspension based on the effect

such modification or suspension would have on the purposes and intent of this Agreement. During the time that the parties are conferring on the form of a modification or challenging the new laws or Decision pursuant to this Section, the Planning Board, County, or Applicant, to the extent not inconsistent with this Agreement, shall take reasonable action to comply with such new Laws or Decision. In addition, Applicant, Planning Board and County shall have the right to challenge the new law or the Decision preventing compliance with the terms of this Agreement. In the event that such challenge is successful, this Agreement shall remain unmodified and in full force and effect, except that the term shall be extended for a period of time equal to the length of time the challenge was pursued and the Agreement was suspended. The Applicant shall be credited for goal achievement during the period during which a challenge is pending if Applicant has continued operating the Program and maintained the Goal as provided for in this Agreement.

12.08 Interpretation. The provisions of this Agreement and the Exhibits hereto shall be construed as a whole according to their common meaning and not strictly for or against any party and consistent with the provisions hereof, in order to achieve the objectives and purposes of the parties hereunder. The captions preceding the text of each Article, Section, subsection and the Table of Contents hereof are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Agreement. Wherever required by the context, the singular shall include the plural and vice versa, and the masculine gender shall include the feminine or neuter genders, or vice versa. If any date upon which action is required under this Agreement shall be a Saturday, Sunday or legal holiday, the date for such action shall be extended to the first regular business day after such date which is not a Saturday, Sunday or legal holiday.

12.09 Assignments and Transfers. Applicant may assign or transfer any of its rights or interests under this Agreement with respect to the Property or any portion thereof without the consent of either the Planning Board or County. Notwithstanding the assignment or transfer of portions or all of the Property (by fee simple conveyance, leasehold or otherwise) or rights or interests under this Agreement to any party (including any governmental entity), Applicant shall continue to be obligated to perform all of its duties and obligations under this Agreement, unless released or partially released in writing by Planning Board and County. Any release or partial release shall be executed by the Planning Board and County upon its presentation by Applicant, provided Applicant fully complies with each of the following conditions:

- (a) No Notice of Default which then remains uncured has been issued; and

- (b) Such assignee or transferee, including any governmental body or agency, has in a writing (substantially conforming with the Sample Assumption/Release attached hereto as Exhibit ____) directed to the Planning Board and County, expressly assumed all duties and obligations as to which Applicant is requesting to be released and has provided Planning Board and County with security and other assurances equivalent to those which were provided by Developer. These assurances must satisfy the Planning Board and County that these duties and obligations will be fully and strictly performed for the balance of the Term of the Program as provided in this Agreement. Any Assumption/Release Agreement must be recorded in the County Land Records. Each duty or obligation of Applicant not expressly assumed by Assignee shall remain the duty or obligation of Applicant for the balance of the Term of the Program. Any full or partial release shall become effective only when executed by the parties and, if required, recorded in the County Land Records.

12.10 Binding Effect on Successors and Assigns. All of the terms, conditions, stipulations, warranties, representations, obligations, and covenants contained in this Agreement shall apply to and be binding upon, and shall inure to the benefit of the parties and each of their respective heirs, personal representatives, administrators, successors and assigns.

12.11 Notices/Public Hearings. All notices and other communications required to be given by any party under this Agreement shall be in writing and shall be deemed duly given by Certified Mail, Return Receipt Requested, Postage Prepaid, as follows:

- (a) If to Applicant: the address as set forth in Program Attachment.
- (b) If to the Planning Board to: Chairman, Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, 8787 Georgia Avenue, Silver Spring, Maryland, 20910, with courtesy copies to the Office of the General Counsel and to the Transportation Planning Division at the same address.
- (c) If to the County to: Director, Montgomery County Department of Transportation, Executive Office Building, 101 Monroe Street, 10th Floor, Rockville, Maryland 20850, with a courtesy copy to the Office of the County Attorney.

- (d) Any public hearing called for in this Agreement shall be held by the Planning Board in the course of its regularly scheduled agenda at M-NCPPC auditorium, 8787 Georgia Avenue, Silver Spring, MD 20910. Notice of a public hearing shall be mailed by Planning Board Staff at least ten days in advance of the public hearing, unless the parties agree in writing to a shorter period of time.

12.12 Conflict Between Agreement and Program Attachment. In the event that a conflict arises in the interpretation of any term or provision establishing any obligation, right, or duty as set forth in the Agreement and the Program Attachment which are clearly inconsistent in meaning and application, then the meaning of the term as set forth in the Program Attachment shall be given effect. In such instances the balance of the term or provision set forth in the Agreement, to the extent it is not in conflict with the Program Attachment, shall continue to be given full force and effect.

12.13 Relationship of Parties. It is understood that the Project is a private development, that neither party is acting as the agent of the other in any respect hereunder, and that each party is an independent contractor. It is further understood that none of the terms or provisions of this Agreement are intended to or shall be deemed to create a partnership, joint venture or joint enterprise between the parties hereto.

12.14 No Third Party Beneficiaries. The only parties to this Agreement are Applicant, Planning Board, and County. There are no third party beneficiaries, and, therefore, this Agreement is not intended, and shall not be construed to, benefit or be enforceable by any other person whatsoever.

12.15 Signature Pages. For convenience, the signatures of the parties to this Agreement may be executed and acknowledged on separate pages which, when attached to this Agreement, shall constitute this as one complete Agreement.

12.16 Time of the Essence. Time is of the essence in the performance of each and every term and condition of this Agreement.

Approved for Legal Sufficiency;
Office of the General Counsel,
M-NCPPC

Recommended for Execution;
Montgomery County Planning
Department

By: _____

By: _____

Date: _____

Date: _____

WITNESS/ATTEST

THE MONTGOMERY COUNTY PLANNING
BOARD OF THE MARYLAND-NATIONAL
CAPITAL PARK AND PLANNING
COMMISSION,
a Maryland public body corporate

By: _____
Charles R. Loehr
Deputy Planning Director

STATE OF MARYLAND)
) to wit:
COUNTY OF MONTGOMERY)

I HEREBY CERTIFY that on this _____ day of _____, 1993, before me, a Notary Public in and for the State and County aforesaid, personally appeared Charles R. Loehr, known to me (or satisfactorily proven) to be the Deputy Planning Director of the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, a Maryland public body corporate, and that such Deputy Planning Director, being authorized to do so, executed the foregoing and annexed instrument for the purposes herein contained by signing the name of the Montgomery County Planning Board.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

My Commission Expires: _____

Approved for Legal Sufficiency;
Office of the County Attorney

Recommended for Execution;

By: _____

By: _____
Graham Norton, Director
Department of Transportation

Date: _____

Date: _____

WITNESS/ATTEST

MONTGOMERY COUNTY, MARYLAND,
a Maryland municipal corporation

By: _____

STATE OF MARYLAND)
) to wit:
COUNTY OF MONTGOMERY)

I HEREBY CERTIFY that on this _____ day of _____, 1993, before me, a Notary Public in and for the State and County aforesaid, personally appeared _____ known to me (or satisfactorily proven) to be the _____ of Montgomery County, Maryland, a Maryland municipal corporation, and that such _____, being authorized to do so, executed the foregoing and annexed instrument for the purposes therein contained by signing the name of the County.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

My Commission Expires: _____

WITNESS/ATTEST

APPLICANT

By: _____

STATE OF MARYLAND)
) to wit:
COUNTY OF MONTGOMERY)

I HEREBY CERTIFY that on this _____ day of _____, 1993, before me, a Notary Public in and for the State and County aforesaid, personally appeared _____ known to me (or satisfactorily proven) to be the _____ of Montgomery County, Maryland, a Maryland municipal corporation, and that such _____, being authorized to do so, executed the foregoing and annexed instrument for the purposes therein contained by signing the name of the Applicant.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

PROGRAM ATTACHMENT

This Program Attachment is intended to be attached to and made a part of a certain Traffic Mitigation Agreement ("Agreement") dated _____ by and between _____ ("Applicant"), the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission ("Planning Board"), and Montgomery County, Maryland ("County"). This attachment is the Program Attachment referred to in the Agreement and shall be given full force and effect as contemplated in the Agreement. The Program Attachment may only be modified as provided for in the Agreement.

I. Nature of Project

- A. Description of size, type, and location of project and property
- B. Number of trips expected to be generated by project
- C. Policy Area embracing project

II. Trip Reduction Goal

- A. Calculation of the Trip Reduction Goal
- B. (Where applicable) Statement and schedule for Phased Goal indicating:

<u>Phase</u>	<u>Trip Goal/Phase</u>	<u>Units or Density/Phase</u>	<u>\$ Sec.Instr./Phase</u>
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- C. Timing for Goal Achievement

III. Trip Reduction Program Components

- A. On-site Components (if any)
 - 1. Description of on-site components
 - 2. Required percentage of Goal
 - 3. Timing for achievement
- B. Off-site Components (if any)
 - 1. Description of off-site components
 - 2. Required percentage of Goal
 - 3. Timing for achievement

IV. Term of the Program

A. Projects not proposed for phasing

B. Projects proposed for Phasing

Phase Units or Density/Phase Commencement Date Termination Date

V. Transportation Coordinator

A. Designation of Coordinator

B. Role/duties of Coordinator

VI. Applicant's Surveys/Tallies

A. Frequency/due date

B. Subject matter of surveys/tallies

C. Methodology/format of counting and reporting results

D. Submission date for Annual Report

VII. Planning Board Audits

A. Frequency

B. Scope

C. Cost Estimate

VIII. Security Instrument

A. Initial Value

B. Timing for Posting

APPLICANT

DATE: _____

By: _____

MONTGOMERY COUNTY PLANNING
BOARD OF THE MARYLAND-
NATIONAL CAPITAL PARK AND
PLANNING COMMISSION

DATE: _____

By _____

MONTGOMERY COUNTY, MARYLAND

DATE: _____

By _____



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